No. 88-1932-CFY
Status: GRANTED

Title: United States, Petitioner
v.
German Munoz-Flores

Docketed:
May 30, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Clarke,Judy

Entry	Date	Note	Proceedings and Orders
1	May 30 1989	G	Petition for writ of certiorari filed.
2	Jun 29 1989		Brief of respondent Munoz-Flores in opposition filed.
3	Jun 29 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Jul 5 1989		DISTRIBUTED. September 25, 1989
5	Sep 14 1989	X	Supplemental brief of petitioner United States filed.
6	Sep 16 1989		Lodging received. (10 copies).
7	Oct 2 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Oct 2 1989		Petition GRANTED. In addressing the justiciability issues presented in this case, the parties are requested to brief the applicability of the political question doctrine.
			**********
10	Oct 16 1989	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Oct 20 1989		Record filed.
		*	Certified copy of original record and C. A. Proceedings,4 volumes, and Volume A received.
11	Oct 30 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	Nov 16 1989		Brief of petitioner filed.
13	Dec 23 1989		Brief of respondent German Munoz-Flores filed.
15	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1990. (1ST CASE)
16	Jan 5 1990		CIRCULATED.
17	Jan 24 1990	X	Reply brief of petitioner Munoz-Flores filed.
18	Feb 20 1990		ARGUED.

88-1932

No.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. 3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1.

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UNITED STATES OF AMERICA, PETITIONER

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GERMAN MUNOZ-FLORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 863 F.2d 654. The opinion of the district court (App., *infra*, 16a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1988. A petition for rehearing was denied on March 29, 1989. App., *infra*, 29a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS !NVOLVED

The Origination Clause of the United States Constitution, Art, I, § 7, Cl. 1, states:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section 3013 of Title 18, U.S. Code (Supp. IV 1986), as it was enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, ch. XIV, § 1405(a), 98 Stat. 2174-2175, provided:

> **§ 3013. Special assessment on convicted persons**
>
> (a) The court shall assess on any person convicted of an offense against the United States –
>
> (1) in the case of a misdemeanor –
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony –
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

STATEMENT

1. In June 1985, respondent and several other persons were indicted in the Southern District of California for aiding the illegal entry of aliens. Prior to trial, respondent entered into a plea agreement with the government. Pursuant to the agreement respondent pleaded guilty to a

superseding information charging him with two misdemeanor counts of aiding and abetting aliens to elude examination and inspection by government officials, in violation of 8 U.S.C. 1325. App., *infra*, 16a, 31a-32a.

In accord with the government's recommendation, the magistrate to whom the case was assigned suspended the imposition of any prison sentence and placed respondent on two years' probation on each count. The magistrate also directed respondent to pay a $25 special assessment on each count under 18 U.S.C. 3013(a) (Supp. IV 1986). That provision, which was enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, § 1405(a), 98 Stat. 2174-2175, stated: "The court shall assess on any person convicted of an offense against the United States – (1) in the case of a misdemeanor – (A) the amount of $25 if the defendant is an individual * * *."[1] The judgment embodying the conviction and sentence, including the suspension of prison sentence, probation, and the total of $50 in assessments, was entered on September 30, 1985. App., *infra*, 16a-17a, 27a-28a.

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[1] Section 3013(a) was amended in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7082, 7085, 102 Stat. 4407, 4408; see App., *infra*, 33a-34a (reproducing current version of Section 3013 and identifying amendments). The amendment, which refined the schedule of assessments for misdemeanors and infractions, does not apply in the present case, as the offenses, the prosecution, and the judgment all occurred in 1985. Under the current version of Section 3013, respondent's offenses, which would be Class B misdemeanors (18 U.S.C. 3559 (Supp. IV 1986)), would result in assessments of only $10 per count. Subsec. (a)(1)(A)(ii). The 1988 amendment, like the 1987 amendment that added subsections (c) and (d) to Section 3013 (see Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 3, 101 Stat. 1279), did not alter Section 3013's directive that assessments shall be imposed on all persons convicted of a federal offense.

On October 15, 1985, respondent filed a motion under Rule 35, Fed. R. Crim. P. (1985),[2] asking the magistrate to correct the allegedly illegal sentence. Respondent's principal argument was that Section 3013 as enacted was unconstitutional under the Origination Clause of the United States Constitution, Art. I, § 7, Cl. 1, because, he contended, it was a "revenue raising statute that unconstitutionally originated in the United States Senate." App., *infra*, 17a. The magistrate rejected the argument and denied the Rule 35 motion. C.A. Excerpt of Record 36-39 (transcript of oral ruling).

On appeal pursuant to 18 U.S.C. 3402, the United States District Court for the Southern District of California affirmed. App., *infra*, 16a-25a.[3] The court observed that it is "well established that the origination clause does not invalidate statutes that are primarily regulatory or penal, but which raise revenue incidentally." *Id.* at 18a. The court concluded that Section 3013 as enacted in 1984 was primarily penal, relying on congressional descriptions of the assessments as penal and on the analysis in *United States* v. *Mayberry*, 774 F.2d 1018 (1985), in which the Tenth Circuit held that Section 3013 was penal for purposes of the Assimilative Crimes Act, 18 U.S.C. 13. App., *infra*, 18a-22a.[4]

[2] At the time, Rule 35(a) provided that "[t]he court may correct an illegal sentence at any time." Rule 35 was completely revised effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015. See § 235(a)(1), 98 Stat. 2031; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

[3] The district court, like the magistrate, rejected not only the Origination Clause challenge but also respondent's additional arguments—that only one assessment could be imposed on him because his two offenses arose from a single transaction (App., *infra*, 23a-24a), and that no special assessment could be imposed for a petty offense, such as his violation of 8 U.S.C. 1325 (App., *infra*, 24a-25a).

2. The court of appeals held Section 3013 as enacted invalid under the Origination Clause and therefore vacated the sentence insofar as it imposed the two $25 assessments. App., *infra*, 1a-15a. The court explained that the Origination Clause establishes a straightforward three-part test for validity: whether "the statute falls within the class of revenue raising bills covered by the clause"; if so, whether "the bill [*i.e.*, the statute] originated in the House"; and if not, whether the Senate's participation in the legislative process can be construed as an amendment permissible under the clause." App., *infra*, 6a & n.4. The court concluded that Section 3013 as enacted failed that test.[5]

[4] The Tenth Circuit held that, because Section 3013 assessments were penal, they were inapplicable to cases arising under the Assimilative Crimes Act, which states that persons who violate state criminal laws in certain areas within federal jurisdiction "shall be guilty of a like offense and subject to a like punishment" (18 U.S.C. 13). In 1987, Congress overruled *Mayberry* by adding subsection (d) to Section 3013. See App., *infra*, 34a.

[5] The court ruled that respondent's Origination Clause challenge does not present a nonjusticiable political question. App., *infra*, 2a-4a. While noting that Congress itself has means to police its own compliance with the Origination Clause (*id.* at 3a & n.1), the court stated that the text of the Clause does not commit its enforcement to the political branches and that the standards of the Clause are judicially manageable and involve no policy determinations (*id.* at 3a-4a). The court also observed that five decisions of this Court and numerous lower court decisions had adjudicated Origination Clause challenges on the merits, although, among all of those decisions, only one district court decision, rendered in 1915, had actually found a violation of the Clause. *Id.* at 4a, 5a-6a & n.3 (citing *Hubbard* v. *Lowe*, 226 F. 135 (S.D.N.Y. 1915)). That lone decision held a statute invalid under the Clause where (a) the parties agreed that the enacted bill was one for

a. On the first question, the court stated that this Court's decisions in *Millard* v. *Roberts*, 202 U.S. 429, 436 (1906), *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897), and *United States* v. *Norton*, 91 U.S. (1 Otto) 566, 569 (1875), established that the Origination Clause "do[es] not extend to bills that incidentally create revenue if those bills were enacted for purposes other than revenue raising." App., *infra*, 6a. Section 3013, the court concluded, was enacted for the purpose of raising revenue.

As an initial matter, the court noted that the statutory language did not sufficiently establish another purpose. The court explained that Section 3013(b), which states that assessments "shall be collected in the manner that fines are collected in criminal cases," might suggest that the assessment is analogous to a fine and therefore punitive, but the court declined to draw that inference. It reasoned that subsection (b) "may be interpreted as a purely procedural requirement" and that the absence in Section 3013 of a restriction on the use of the collected funds "suggests that the revenue raising aspect of the bill is not subsidiary to any enunciated functions." App., *infra*, 7a-8a.

Turning to the legislative history of Section 3013, the court pointed out (App., *infra*, 8a) that the provision was designed in part to help defray the cost of the newly established Crime Victims Fund, which would provide funds to assist victims of crime (42 U.S.C. 10601 *et seq.*). See S. Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984). The court acknowledged, based on *Millard* v. *Roberts*, 202 U.S. at 436-437 (rejecting Origination Clause challenge to tax on District of Columbia property enacted to provide funding to railway company), that the provision might

raising revenue and (b) the bill was accompanied by an official certification by the secretary of the Senate that the bill originated in the Senate. 226 F. at 137, 138.

well have been constitutional "[h]ad the proceeds been clearly confined to this purpose." App., *infra*, 8a. The court concluded, however, that Section 3013's main purpose was not to fund victims' assistance programs, because "Congress contemplated that the revenue might be used as general federal revenue." App., *infra*, 9a. The court relied for that conclusion (*id.* at 8a, 9a) chiefly on the Senate Judiciary Committee's statement—in the Senate Report that accompanied a bill, S. 2423, 98th Cong., 2d Sess. (1984), that was similar but not identical to the ultimately enacted Section 3013—that the assessments "will constitute new income for the Federal government." S. Rep. No. 497, *supra*, at 14.[6]

The court next rejected (App., *infra*, 10a) the suggestion that the penal character of the assessments was shown by the fact that the Senate Committee and S. 2423 both used the term "penalty assessment." See S. Rep. No. 497, *supra*, at 5, 13; 130 Cong. Rec. 23,803-23,804 (1984) (reproducing S. 2423 as passed by the Senate). The label "penalty" is irrelevant, the court said, and "penalty assessment" does not appear in the codified version of the statute, since Congress changed the language to "special assessment" in the enacted bill. That Section 3013 exacts money only from convicted persons, the court continued, does not mean that the exaction is not a tax, for Congress is free to tax the class of convicted persons. App., *infra*, 10a-11a. In addition, the court explained that there was no persuasive judicial precedent holding Section 3013 punitive

[6] The court also stated (App., *infra*, 9a) that "Congress failed to restrict the use of the monies assessed under section 3013 in any way, so that they might be shifted to another purpose at any time" and that Congress recognized that "only small amounts would be collected by the assessments."

for purposes of the Origination Clause.[7] Accordingly, the court concluded (App., *infra*, 12a) that "the primary purpose of the special assessment was to raise revenue, not to finance state victim assistance programs or to punish offenders."

b. The court next concluded that the legislative history "clearly indicates that section 3013 originated in the Senate." App., *infra*, 12a. Although Section 3013 was enacted into law by Section 1405(a) of a House bill, H.R.J. Res. 648, 98th Cong., 2d Sess. (1984), the court examined the legislative history to determine from which house the particular assessment provision came. The court found that Section 3013 originated in a Senate bill, S. 2423, 98th Cong., 2d Sess. (1984).

The court explained that, on May 1, 1984, in hearings on S. 2423, Senator Heinz proposed to include in that bill a provision allowing for the collection of "penalty assess-

[7] The court noted (App., *infra*, 11a-12a) that all but one of the prior decisions holding that Section 3013 assessments are punitive drew that conclusion for purposes of the Assimilative Crimes Act, 18 U.S.C. 13, or the Seventh Amendment civil jury trial right. See *United States* v. *Mayberry*, 774 F.2d 1018 (10th Cir. 1985) (18 U.S.C. 13); see also *United States* v. *Davis*, 845 F.2d 94, 97 n.2 (5th Cir. 1988) (same); *United States* v. *King*, 824 F.2d 313, 317 (4th Cir. 1987) (same); *United States* v. *Smith*, 818 F.2d 687 (9th Cir. 1987) (Seventh Amendment). The court declined to follow the sole prior decision rejecting an Origination Clause challenge to Section 3013, *United States* v. *Ramos*, 624 F. Supp. 970, 973 (S.D.N.Y. 1985), explaining that it relied on *Mayberry*'s analysis outside the Origination Clause context. App., *infra*, 12a. The court of appeals also noted (*id.* at 11a) that two decisions, *United States* v. *Donaldson*, 797 F.2d 125, 127 (3d Cir. 1986), and *United States* v. *Dobbins*, 807 F.2d 130 (8th Cir. 1986), had stated that Section 3013 was not a criminal statute subject to the rule of lenity because its purpose was to raise funds to support the crime victims' assistance program; the court of appeals did not discuss those decisions in rejecting the claim that the purpose of Section 3013 was to support the victims' program.

ments" (*The Victims of Crime Assistance Act of 1984: Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 21 (1984)), and such a provision was included in the bill reported by the Senate Judiciary Committee on May 10, 1984 (S. Rep. No. 497, *supra*, at 4, 13) and passed by the Senate on August 10, 1984 (130 Cong. Rec. 23,803-23,805). That bill was never passed by the House. According to the court of appeals, the next relevant step in the legislative process occurred on October 4, 1984, when the Senate had before it the version of the 1985 continuing appropriations bill, H.R.J. Res. 648, that the House had passed on September 25, 1984 (130 Cong. Rec. H10,131 (daily ed.))—a bill that did not then contain any assessment provision (see *id.* at H11,970 (daily ed. Oct. 10, 1984) (joint explanatory statement of conference committee)). On October 4, according to the court of appeals (App., *infra*, 13a), the Senate "added the text of the Victims of Crime Assistance Act of 1984, including the special assessment provision, to [H.R.J. Res. 648]." 130 Cong. Rec. S13,520, S13,544 (daily ed.). After that amendment, the Senate passed H.R.J. Res. 648 the same day (*id.* at S13,384), and the provision remained in the conference committee's bill (130 Cong. Rec. H11,913 (daily ed. Oct. 10, 1984)), which was approved by both houses (130 Cong. Rec. H12,107, S14,226 (daily ed. Oct. 10, 11, 1984)) and became law on October 12, 1984 (Pub. L. No. 98-473, 98 Stat. 1837).

The court of appeals summarized its reading of the legislative history: "[t]he special assessment provision was introduced in the Senate Judiciary Committee, it was first passed by the Senate and was only adopted by the House on later repassage of H.J. Res. 648." App., *infra*, 13a-14a. Based on that reading, the court concluded that "the Senate clearly initiated the special assessment legislation." App., *infra*, 13a.

c. Finally, the court ruled that Section 3013 was not valid under the proviso to the Origination Clause, which states that "the Senate may propose or concur with Amendments as on other Bills." The court observed that the Senate may attach an amendment to raise revenue to a House bill only if the House bill itself is a revenue-raising measure within the meaning of the Clause. Here, the court concluded, the House-passed version of H.R.J. Res. 648 that the Senate amended on October 4, 1984, was not a bill for raising revenue and so was not validly amended by the revenue-raising Senate amendment. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held an Act of Congress unconstitutional, and its decision will affect thousands of cases every year. In addition, the court's ruling directly conflicts with several district court decisions, it rests on an interpretation of Section 3013 that conflicts with the views of other courts of appeals, and it is contrary to this Court's Origination Clause decisions. The court of appeals erred both in ruling that Section 3013 was enacted in a "Bill[] for raising Revenue" and in ruling that Section 3013 originated in the Senate.

1. The decision of the court of appeals would invalidate sentences in thousands of cases each year in the Ninth Circuit alone and in tens of thousands more each year if followed in other circuits. By its terms Section 3013 applies to every defendant convicted of a federal crime.[8] Although the court invalidated the original 1984 version of

[8] In the year ending June 1988, there were approximately 40,000 criminal convictions nationwide, approximately 9,000 of which occurred within the Ninth Circuit. Director, Administrative Office of U.S. Courts, *Annual Report 1988*, at 298, 302.

Section 3013, the 1988 amendment, which revised one part of Section 3013(a), only marginally diminishes the reach of the decision.[9]

With respect to felonies, which are subject to Section 3013(a)(2), the 1984 version has not been amended. The Ninth Circuit ruling would therefore invalidate assessments in all felony convictions since the 1984 enactment took effect and indefinitely into the future. The Executive Office of the United States Attorneys has informed us, based on statistics collected from the United States Attorneys' offices, that in the year ending September 30, 1988, more than 27,000 assessments were imposed on felony counts nationwide, and more than 3,700 were imposed in the Ninth Circuit. With respect to misdemeanors and other lesser offenses, which are subject to Section 3013(a)(1), the 1984 law struck down by the court of appeals applied to all criminal convictions until subsection (a)(1) was amended in December 1988. According to the Executive Office, more than 13,000 assessments were imposed on misdemeanor counts annually prior to the amendment, and more than 3,000 in the Ninth Circuit.

The decision of the court of appeals holding Section 3013 invalid has already begun to generate conflicts among the lower courts. Several district court decisions have upheld the statute against such challenges. See, *e.g.*, *United States* v. *Clark*, No. 88 Cr. 0793 (RWS) (S.D.N.Y. Mar. 22, 1989), appeal pending (2d Cir.); *United States* v. *McDonough*, Cr. No. 4-88-137(1) (D. Minn. Feb. 23, 1989), appeal pending (8th Cir.); *United States* v. *Hines*, 88 Cr. 739 (MBM) (S.D.N.Y. Feb. 23, 1989), appeal pending (2d Cir.); *United States* v. *Ramos*, 624 F. Supp. 970,

[9] The 1987 amendment of Section 3013 did not amend subsection (a), which mandates the imposition of the assessments. See note 1, *supra*.

973 (S.D.N.Y. 1985). Other district courts have followed the court of appeals' decision in this case. See, *e.g.*, *United States* v. *Thompson*, CR 88-479A (N.D. Ga. Mar. 20, 1989), appeal pending (11th Cir.); *United States* v. *Culbreath*, No. 88-00186 (M.D. Tenn. Feb. 27, 1989), appeal pending (6th Cir.); *United States* v. *Hamilton*, Cr. No. 88-136 (W.D. Pa. Feb. 15, 1989), appeal pending (3d Cir.); *United States* v. *Simpson*, Cr. No. 88-91 (W.D. Pa. Feb. 15, 1989), appeal pending (3d Cir.); *United States* v. *Williams*, Cr. No. 88-96 (W.D. Pa. Feb. 8, 1989), appeal pending (3d Cir.); *United States* v. *Solomonson*, Cr. No. 3-88-73 (D. Minn. Feb. 6, 1989), appeal pending (8th Cir.). No other court of appeals has yet rejected an Origination Clause challenge to Section 3013, but appeals are now pending in all of the cited recent district court decisions, and the issue is currently being litigated in numerous cases through the nation.

In addition, as the court of appeals in the present case acknowledged (App., *infra*, 11a-12a), the decision below rests on interpretations of Section 3013 that are, at a minimum, in tension with the interpretations adopted by several other courts of appeals in cases not involving the Origination Clause. Two circuits have concluded that Section 3013 was designed to provide funds for the crime victims' assistance programs, *United States* v. *Donaldson*, 797 F.2d 125, 127 (3d Cir. 1986); *United States* v. *Dobbins*, 807 F.2d 130 (8th Cir. 1986), whereas the court in the present case concluded that the provision's primary purpose was not to finance such programs (App., *infra*, 8a-9a, 12a). And three circuits have concluded that the assessments under Section 3013 as enacted were punitive, *United States* v. *Davis*, 845 F.2d 94, 97 n.2 (5th Cir. 1988); *United States* v. *King*, 824 F.2d 313, 317 (4th Cir. 1987); *United States* v. *Mayberry*, *supra* (10th Cir.), whereas the court in the present case concluded that the provision's primary purpose was not to punish offenders (App., *infra*, 10a-12a).

2. a. The court of appeals mistakenly concluded that Section 3013 as enacted was a "Bill[] for raising Revenue" within the meaning of the Origination Clause. This Court has given the Clause a narrow interpretation.[10] The court of appeals' decision is inconsistent with this Court's decisions establishing that the Clause does not apply to legislation that imposes an exaction for a purpose other than the raising of general revenue.

This Court has three times ruled, following Justice Story's analysis of the Origination Clause, that "the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U.S. at 202-203. Accord *Millard* v. *Roberts*, 202 U.S. at 436-437; *United States* v. *Norton*, 91 U.S. (1 Otto) at 569.[11] Under that principle, even an as-

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[10] As the court of appeals noted (App., *infra*, 2a-6a), this Court has never held a statute invalid under the Origination Clause, and there appears to be only one decision so holding. That decision, rendered by a district court in 1915, was based on the express declaration of the secretary of the Senate that a bill that was concededly a revenue-raising measure originated in the Senate. See note 5, *supra*.

[11] This understanding of the narrow scope of the Clause is supported by its carefully chosen language, which refers not to bills that raise revenue or to revenue-raising bills or to money bills, but to bills "for" raising revenue. This narrow reading is also supported by the debates on the Clause in the 1787 Convention. See, *e.g.*, 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 263 (1937) (Randolph); *id.* at 273 (Mason); *id.* at 276 (Madison) (noting that the term "revenue" is ambiguous, that many measures would have a revenue purpose as well as another, and that it would often be difficult to determine whether raising revenue was the primary one).

sessment labeled a "tax" by Congress is not necessarily within the strict meaning of the Clause. Thus, in *Nebeker*, the Court rejected an Origination Clause challenge to a provision in a law that established a national currency secured by a pledge of bonds of the United States and that imposed what the statute labeled a tax on notes in circulation. The Court held that the provision was not a revenue-raising measure within the strict sense of the Clause because the tax was designed "to meet the expenses attending the execution of the act" and to accomplish the goal of establishing the currency, rather than "to raise revenue to be applied in meeting the expenses or obligations of the Government." 167 U.S. at 202-203. Similarly, in *Millard*, the Court rejected an Origination Clause challenge to a law levying a tax on property within the District of Columbia in order to raise money for certain railroad construction activity. The Court explained that the measure was not within the Clause because "[w]hatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437. See also *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983) (50-cent deduction imposed on proceeds of milk sales to defray cost of price-support program and to reduce overproduction not within Origination Clause).

Section 3013 was not enacted in violation of the Origination Clause because it was not designed to raise general revenue for the support of the government. Rather, the provision was enacted as one part of an integrated program to provide assistance to victims of crime. Victims of Crime Act of 1984, Pub. L. No. 98-473, §§ 1401-1405, 98 Stat. 2170-2175. That Act established a Crime Victims Fund and various grant programs to provide such assistance (42 U.S.C. 10601, 10602, 10603 (Supp. II 1984)), and it directed that the special assessments collected under the authority of Section 3013

(along with certain fines and forfeitures) are to be deposited into the Fund (42 U.S.C. 10601(b)(2) (Supp. II 1984)). A measure like Section 3013 that imposes an assessment to support a particular governmental program is not a bill for raising revenue – especially if the program itself is a remedial one designed to address problems caused by the conduct of the class of persons on whom the assessment is imposed.

The court of appeals, while appearing to recognize the *Millard-Nebeker* principle, rejected its application here simply because, in its view, Section 3013 assessments would be available as general revenue. App., *infra*, 8a-9a. There is no adequate basis for that view or the inference the court drew from it. The Senate Committee statement that the assessments "will constitute new income for the Federal government" (S. Rep. No. 497, *supra*, at 14), on which the court placed principal reliance, does not support the court's conclusion. That simple observation would be equally true for any bill that brought in money to fund a particular governmental program, such as the railroad construction program in *Millard* or the currency program in *Nebeker*; the statement does not mean or imply that assessments would be available for general governmental expenditures.

Moreover, the court wholly ignored Congress' command, in the same statute that contained the assessment provision, that assessments are not to be placed in the general fund of the Treasury but are to be deposited in the separate Crime Victim's Fund. 42 U.S.C. 10601 (Supp. II 1984). In fact, moneys from that Fund were to be transferred to the general Treasury only if the Fund reached $100 million (42 U.S.C. 10601(c)(1) (Supp. II 1984)), and that figure has never been reached by the Fund. See U.S. Dep't of Justice, Office for Victims of Crime, Office of Justice Programs, *Victims of Crime Act of 1984: A Report*

to Congress By the Attorney General 11 (1988).[12] In any event, even if excess amounts are eventually transferred, the character of the assessment provision would not change; and nothing in *Millard* or *Nebeker* or the statutes involved there indicates that money raised under the programs at issue would under no circumstances be used as general revenue. Hence, the assessment provision is properly viewed as outside the reach of the Origination Clause because it was designed to finance victim assistance programs rather than to raise general revenue.

In addition, under an appropriately narrow reading of the Origination Clause—and under the principle that "[a] statute * * * is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality," *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981)—Section 3013 as enacted should have been upheld because, like fines and forfeitures, the assessments should be characterized as penal. There are several bases for such a characterization. Assessments are imposed only on convicted criminals, and they are imposed as part of the sentence. Section 3013(b) directs that assessments are to "be collected in the same manner that fines are collected in criminal cases." The provision directing that assessments be deposited in the Crime Victims' Fund refers to them as "penalty assessments." 42 U.S.C. 10601(b)(2) (Supp. II 1984). And the statute that added Section 3013 to the Criminal Code did so in a provision, Section 1405(a), that was labeled "penalty assessment." 98 Stat. 2174.[13] Under those circumstances, a court seeking to avoid rather than invite a constitutional question would have construed the provision to be a penal measure and not to be a strict measure for raising revenue subject to the Origination Clause.

[12] The $100 million cap has since been raised. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7121(a), 7129, 102 Stat. 4419, 4423; Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, § 102(b)(1), 100 Stat. 904.

b. Even if the court of appeals were correct that Section 3013 as enacted came within the scope of the Origination Clause, the decision would still be wrong. The court erred in concluding that the assessment provision originated in the Senate. That conclusion rests on a mistaken reading of the legislative history and on an insufficient appreciation of the "practical construction" (*Nebeker*, 167 U.S. at 202) that must be given, and has been given by Congress itself, to the Clause.

It is true, as the court of appeals stated (App., *infra*, 13a), that the Senate in the 98th Congress was the first of the two houses to pass an assessment provision. But the court incorrectly suggested that it was that provision, Section 201 of S. 2423, which the Senate added to H.R.J. Res. 648 on October 4, 1984. While the Senate's October 4th amendment was identical to the provision ultimately enacted (see 130 Cong. Rec. S13,520, S13,544 (daily ed.)), S. 2423 is different in wording and structure.[14] What the

[13] The Senate's use of "penalty assessments" in its first assessment provision lends additional support. See p. 7, *supra*. Contrary to the court of appeals' suggestion (App., *infra*, 10a-11a), there is no indication that Congress altered its understanding of the assessment provision when it changed "penalty assessments" to "special assessments."

[14] Section 201 of S. 2423 stated (130 Cong. Rec. 23,805 (1984)):

PENALTY ASSESSMENT FEES

Sec. 201. Whenever any person is convicted of an offense in any court of the United States, the court shall impose a penalty

Senate added to H.R.J. Res. 648 was actually the text of a provision of a House bill—Section 1005 of H.R. 5690, 98th Cong., 2d Sess. (1984)—that the House had passed two days earlier, on October 2, 1984. 130 Cong. Rec. H10, 721, H10,859 (daily ed.).[15] Hence, the first house to pass the assessment provision that was enacted into law was the House of Representatives, not the Senate. And what the Senate did by its October 4th amendment was nothing more than to take two House-passed bills and to merge part of one into the other.

Where, as here, the House is the first actually to pass the precise measure in question, the measure must be found to have originated in the House, even though a similar measure had earlier been passed by the Senate. Although other conditions would doubtless also be sufficient to find House origination, one sensible and readily applicable test for origination is which house first passed the particular measure that was ultimately enacted. That conclusion also follows *a fortiori* from the well-established prerogative of the House, upon being presented with a Senate-originated bill for raising revenue, to insert the Senate's language into

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assessment fee on such person in the amount of—

(a) $25, if the defendant is an individual and the offense is a misdemeanor;

(b) $50, if the defendant is an individual and the offense is a felony;

(c) $100, if the defendant is a person other than an individual and the offense is a misdemeanor; and

(d) $200, if the defendant is a person other than an individual and the offense is a felony.

[15] Section 1005 of the House bill is identical to Section 405 of H.R.J. Res. 648—the section adding Section 3013 to the criminal code—as it was enacted into law as Pub. L. No. 98-473.

a House bill, pass the new bill, and send it to the Senate.[16] Since the House may do that, it may also, upon being presented a Senate-originated revenue bill, insert a *modified* version of that bill into a new House bill. The fact that the new House bill "originated" in the House is not altered in any way when that bill and another House bill are combined by the Senate into a single bill.

In the present case, the House bill, H.R. 5690, was not simply a modified version of the earlier Senate-passed measure, S. 2423. It was an accommodation of S. 2423 and several other measures, including another House bill, H.R. 3498, 98th Cong., 1st Sess. (1983).[17] Rep. Rodino explained the origins of the Senate amendments to H.R.J. Res. 648 and hence of the conference bill (130 Cong. Rec. H12,084 (daily ed. Oct. 10, 1984)):

> The other body early last August passed a modified version of the administration bill, and shortly after that I began negotiations with the administration and the leadership of the other body's Judiciary Committee. Those negotations successfully resolved the dif-

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[16] See generally 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives* §§ 13-18, at 292-312 (1974) (H.R. Doc. No. 661, 94th Cong., 2d Sess. (1974)); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 1484, 1485, 1495, at 943-969 (1907). Without that prerogative, the House could be entirely precluded by the Senate from adopting a given revenue measure if the Senate simply passed it first. That would not only be practically intolerable but would turn the Origination Clause's protection of a House prerogative on its head.

[17] In light of the court of appeals' statement that "[t]he special assessment provision was introduced in the Senate Judiciary Committee" in May 1984 (App., *infra*, 13a-14a), it is worth noting that Rep. Rodino introduced H.R. 3498 on June 30, 1983, and that H.R. 3498 is far closer to the enacted bill in language and structure than is S. 2423. See U.S. Dep't of Justice, Office of Justice Programs, *Indexed Legislative History of the Victims of Crime Act of 1984*, at 176 (1985).

> ferences among the three bills—H.R. 3498, the administration bill, and the bill passed by the other body. I introduced the compromise that we worked out—H.R. 6403—which was also included in the crime package amendments to H.R. 5690 that were approved by the House on Tuesday, October 2. The other body attached the compromise to the continuing resolution, and the House's conferees agreed to accept the language.

In short, the bill that enacted Section 3013 into law originated in the House for purposes of the Origination Clause.

c. The foregoing conclusions are bolstered by a number of considerations that strongly counsel against judicial invalidation of statutes under the Origination Clause. To begin with, this Court has at least implicitly suggested that policing compliance with the Clause might be a matter for Congress alone. Thus, based on the ruling in *Field* v. *Clark*, 143 U.S. 649 (1892), that a court should not look behind the signatures of the Speaker and the President of the Senate on an enrolled bill to determine whether the signed bill omitted a provision included in the bill upon its passage, the Court has on three occasions expressly reserved the question whether it is ever appropriate for a court to examine the Journals of Congress to determine in which house a bill that has been passed by both houses and signed by the President in fact originated. *Rainey* v. *United States*, 232 U.S. 310, 317 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 143 (1911); *Nebeker*, 167 U.S. at 203.[18]

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[18] The Fifth Circuit in *Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163 (1985), cert. denied, 476 U.S. 1151 (1986), held nonjusticiable the question whether a bill that reduced taxes was

In addition, the Senate and House of Representatives have a strong reliance interest in the continuation of at most a modest judicial role under the Origination Clause. No court has struck down any statute under the Clause, except for the lone 1915 district court decision that involved an express congressional declaration of Senate origin of a concededly revenue-raising bill—a matter of labels entirely within Congress's control. See note 5, *supra*. Various House precedents clearly exhibit reliance on a limited judicial role. See, *e.g.*, 6 C. Cannon, *Cannon's Precedents of the House of Representatives* § 314, at 448 (1935) (Origination Clause objection in House untimely once bill went to conference); *id.* § 315, at 448-449 (discussing "differentiation between bills for the purpose of raising revenue and bills which incidentally raise revenue"); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* § 1491, at 954 (1907) (discussing untimeliness of Origination Clause objection). As a practical matter, Congress has enacted legislation against the background of the lenient standards of this Court's and other courts' decisions.

Furthermore, the House and Senate have long paid close attention to the enforcement of the Origination Clause. See, *e.g.*, 2 A. Hinds, *supra*, § 1481, at 942 (discussing 1807 precedent); H.R. Doc. No. 279, 99th Cong., 2d Sess. 43-44 (1987) (House annotation of Origination Clause, citing to rules and precedents). The House's ability to enforce its prerogatives under the Clause

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a bill for raising revenue within the meaning of the Origination Clause.

Indeed, it is not entirely clear whether it is possible to formulate judicially manageable standards to determine in all cases whether a bill is truly a revenue bill "in the strict sense" or whether a bill "originated" in the House, given that many bills have mixed purposes, that "origination" has no single obvious meaning, and the need for congressional flexibility.

strengthens the case for viewing the Clause at least primarily as an internal rule of procedure not calling for aggressive judicial supervision. Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (federalism limits of Tenth Amendment enforceable principally through the political process). Such a view of the Clause is also suggested by the difficulty of identifying what concrete protections the Clause today affords the citizenry. While the British rule that money bills must originate in the House of Commons, with the House of Lords entitled only to approve or disapprove, reflected the unrepresentative character of the Lords, that concern was always of limited applicability to our government (see J. Story, *Commentaries on the Constitution* §§ 445, 446, at 315-317 (R. Rotunda & J. Nowak ed. 1987)), and it is especially so now that the Senate is popularly elected. U.S. Const. Amend. XVII.[19] Hence, as the court of appeals in the present case acknowledged, "diminished concern about the Senate's lack of accountability has largely undermined the clause's rationale." App., *infra*, 4a (footnote omitted).

Accordingly, in addition to the ordinary principle requiring statutes to be construed to avoid constitutional difficulties, considerations distinctive to the Origination Clause counsel caution in the judicial invalidation of a duly enacted statute under the Clause. The court of appeals' decision here did not display the needed caution.

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[19] The Framers drew the Origination Clause from the British rule, but like most of the States prior to 1787, they deliberately departed from the British model by, inter alia, permitting the Senate to amend House bills for raising revenue. See, *e.g.*, 1 M. Farrand, *supra*, at 233 (Madison); 2 *id.* at 278 (Dickenson); *id.* at 279 (Rutlidge); 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 376 (2d ed. 1836) (Madison).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-5236

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERMAN MUNOZ-FLORES, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California

[Filed Dec. 12, 1988]

Before WRIGHT, FERGUSON and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

In this appeal of the denial of a motion to set aside a sentence imposing two twenty-five dollar special assessments for immigration law violations, German Munoz-Flores ("Munoz") contends that passage of the Special Assessment on Convicted Persons (18 U.S.C. § 3013 (1984)) did not comply with the requirements of the origination clause of the Constitution.

We find that the constitutionality of the Special Assessment on Convicted Persons is squarely presented in this

appeal. An analysis of the legislative history of the statute persuades us that the enactment of the special assessment failed to comply with the constitutionally mandated procedure. We therefore vacate that portion of the court's sentencing order imposing special assessments.

FACTS AND PROCEEDINGS

After pleading guilty to two counts of aiding and abetting an alien to elude examination and inspection in violation of 18 U.S.C. § 2 and 8 U.S.C § 1325, Munoz was sentenced to two years unsupervised probation and ordered to pay special assessments of $25 for each count, pursuant to 18 U.S.C. § 3013.

Munoz moved to correct this sentence under Fed.R. Crim.P. 35(a), asserting that the special assessments were invalid because the legislation authorizing these assessments originated in the Senate contrary to article I, § 7 of the Constitution. The magistrate denied the motion, finding the assessment constitutional, and the district court affirmed. Munoz timely appeals.

ANALYSIS

I

JUSTICIABILITY

Before turning to the merits of Munoz's constitutional claim, we must consider whether an origination clause challenge to a statute implicates the political question doctrine, rendering the issue inappropriate for judicial determination. The Supreme Court has indicated that an issue is nonjusticiable when one of the following circumstances is present: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manage-

able standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *INS v. Chadha,* 462 U.S. 919, 941, 103 S.Ct. 2764, 2779, 77 L.Ed.2d 317 (1983) (quoting *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962)).

The instant case presents none of these factors. The text of the origination clause does not commit its interpretation to the political branches. The standards of the clause are clear, and its application requires no policy determinations. The determination of which house a bill originated in and whether it raises revenue are questions the courts are functionally well-equipped to answer. Finally, this case does not implicate prudential considerations of deference to the decisions of another governmental branch. Although mechanisms allowing Congress itself to question the constitutionality of a bill under the origination clause exist[1], the failure of Congress to inquire whether a statute violates the origination clause should not preclude the courts from doing so. Certainly this court should not interpret Congress' silence on an origination clause issue to preclude judicial examination, when it has refused to draw such a conclusion from Congress' explicit finding that a bill did not violate the origination clause. *See Armstrong*

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[1] A resolution asserting the House's constitutional prerogatives is the usual method of legislatively asserting origination clause issues. *See* 3 Deschler's Precedents of the United States House of Representatives § 13 (1974).

v. United States, 759 F.2d 1378, 1380 (9th Cir.1985) ("Although Congress has an obligation to enact legislation that it deems to be constitutional, its determination that a particular statute is constitutional does not foreclose or relieve this court from conducting its own analysis of that issue"). *But cf. Texas Assoc. of Concerned Taxpayers v. United States,* 772 F.2d 163, 166-67 (5th Cir.1985) (refusing to analyze a statute under the origination clause on the grounds that Congress had itself previously determined that the statute in question did not violate the origination clause), *cert. denied,* 476 U.S. 1151, 106 S.Ct. 2265, 90 L.Ed.2d 710 (1986). Holding the origination clause justiciable also comports with a number of Supreme Court decisions in which the Court adjudicated origination clause challenges to statutes. *See, e.g., Flint v. Stone Tracy Co.,* 220 U.S. 107, 142-43, 41 S.Ct. 342, 345-46, 55 L.Ed. 389 (1911).

Therefore, we consider the merits of Munoz's claim.

II

THE ORIGINATION CLAUSE

The origination clause provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7. The origination requirement was intended to grant primary power over taxation to the house more closely tied to the popular will. *See* 2 P. Kurland & R. Lerner, *The Founders' Constitution* 376 (1987). Although diminished concern about the Senate's lack of accountability has largely undermined the clause's rationale[2], the requirement of

[2] Almost eighty years ago, Charles Beard dismissed the origination clause in the following terms: "It can hardly be said that it constitutes any safeguard against careless and corrupt finance in legislatures; and it must be admitted also that it has slowly been declining in public esteem." C. Beard, *American Government & Politics* 706-07 (1910).

origination in the House persists and in recent years has been the basis of a number of statutory challenges. *See, e.g., Sperry Corp. v. United States,* 12 Cl.Ct. 736 (1987) (rejecting an origination clause challenge to the Iran Claims Act), *reversed on other grounds,* 853 F.2d 904 (Fed.Cir.1988); *Armstrong,* 759 F.2d at 1378 (upholding the Tax Equity and Fiscal Responsibility Act of 1982 against an origination clause challenge).[3] Indeed, one decision struck down a statute on the grounds that it violated article I, § 7. *Hubbard v. Lowe,* 226 F. 135 (S.D.N.Y.

[3] Other cases construing the origination clause include: *United States v. Norton,* 91 U.S. 566, 23 L.Ed. 454 (1875); *Twin City Bank v. Nebeker,* 167 U.S. 196, 17 S.Ct. 766, 42 L.Ed. 134 (1897); *Millard v. Roberts,* 202 U.S. 429, 26 S.Ct. 674, 50 L.Ed. 1090 (1906); *Flint v. Stone Tracy Co.,* 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389 (1911); *Rainey v. United States,* 232 U.S. 310, 34 S.Ct. 429, 58 L.Ed. 617 (1914); *United States ex rel. Michels v. James,* 26 F.Cas. 577 (S.D.N.Y.1875) (No. 15,464); *United States v. Billings,* 190 F. 359 (S.D.N.Y.1911), *rev'd on other grounds sub. nom., Pierce v. United States,* 232 U.S. 290, 34 S.Ct. 427, 58 L.Ed. 609 (1914); *Bertelsen v. White,* 65 F.2d 719 (1st Cir.1933); *Mulroy v. Block,* 569 F.Supp. 256 (N.D.N.Y.1983), *aff'd,* 736 F.2d 56 (2d Cir.1984), *cert. denied,* 469 U.S. 1159, 105 S.Ct. 907, 83 L.Ed.2d 922 (1985); *Moon v. Freeman,* 379 F.2d 832 (9th Cir.1967) (dicta); *United States v. Ramos,* 624 F.Supp. 970 (S.D.N.Y.1985); *Leary v. United States,* 395 U.S. 6, 21, 89 S.Ct. 1532, 1540, 23 L.Ed.2d 57 (1969); *State v. Block,* 717 F.2d 874 (4th Cir.1983), *cert. denied,* 465 U.S. 1080, 104 S.Ct. 1444, 79 L.Ed.2d 764 (1984); *Swearingen v. United States,* 565 F.Supp. 1019 (D.Colo.1983); *Edwards v. Carter,* 580 F.2d 1055 (D.C.Cir.), *cert. denied,* 436 U.S. 907, 98 S.Ct. 2240, 56 L.Ed.2d 406 (1978). Recently, the controversy surrounding the passage of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) has produced a large number of origination clause cases. These cases have uniformly upheld TEFRA as not violative of the origination clause. *See, e.g., Hudson v. United States,* 766 F.2d 1288 (9th Cir.1985).

1915), *appeal dismissed,* 242 U.S. 654, 37 S.Ct. 12, 61 L.Ed. 547 (1916).

Munoz asserts that the adoption of section 3013 violated article I, § 7. The analysis of an origination clause issue is straightforward and tracks the language of the clause. First, we must gauge whether the statute falls within the class of revenue raising bills covered by the clause. If the bill is one that raises revenue within the meaning of art. I, § 7, the court must next determine if the bill originated in the House, as required by the clause. Finally, the court must examine whether the Senate's participation in the legislative process can be construed as an amendment permissible under the clause. With these guidelines in mind, we turn to an examination of the challenged statute.

A. *Is the Special Assessment a Revenue Bill?*[4]

By its terms, the origination clause applies only to bills that raise revenue. However, the fact that a statute produces governmental income is not dispositive. Supreme Court decisions hold that origination clause constraints do not extend to bills that incidentally create revenue if those bills were enacted for purposes other than revenue raising. *See, e.g., Millard,* 202 U.S. at 436, 26 S.Ct. at 675; *Nebeker,* 167 U.S. at 202, 17 S.Ct. at 768-69; *Norton,* 91 U.S. at 569.

These precedents mandate an inquiry into the purposes of the special assessment legislation to determine if the challenged statute is a "Bill[ ] for raising Revenue" within the meaning of the origination clause. The relevant question is: was the special assessment statute enacted "for the direct and avowed purpose of creating revenue or public funds for the service of the government"? *Norton,* 91 U.S.

[4] The "bill" under consideration is the statute providing for the collection of special assessments.

at 569 (quoting *United States v. Mayo,* 26 F.Cas. 1230 (C.C.D.Mass.1813) (No. 15,755) (interpreting the term "revenue law" in the context of an 1804 federal crimes act)).

To determine the purpose of the special assessment we first turn to the language of the statute. Section 3013 provides:

> (a) The court shall assess on any person convicted of an offense against the United States
>
> (1) in the case of a misdemeanor
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.
>
> (c) The obligation to pay an assessment ceases five years after the date of the judgment.
>
> (d) For the purposes of this section, an offense under section 13 of this title is an offense against the United States.

On its face, the statute offers little insight into its underlying purpose. The subsection requiring that the assessments be collected in the same manner as criminal fines might be read to suggest that the assessment is analogous to a criminal fine, and thus is punitive. However, the wording does not indicate explicitly that the special assessment is meant to punish, and the subsection addressing

collection may be interpreted as a purely procedural requirement. Most important, the language fails to limit or even to describe the use of the collected funds. This lack of restriction suggests that the revenue raising aspect of the bill is not subsidiary to any enunciated function.

Because the statutory language is ambiguous, we examine legislative history to infer Congress' intent. *See Blum v. Stenson,* 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In its report, the Senate Committee on the Judiciary states:

> The purpose of imposing nominal assessment fees is to generate needed income to offset the cost of the [victims' assistance fund] authorized under S. 2423. Although substantial amounts will not result, these additional amounts will be helpful in financing the program *and will constitute new income for the Federal government.*

S.Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984), *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3607, 3619-20 [hereinafter S.Rep. No. 497] (emphasis added).

This statement of purpose and the testimony by the provision's sponsor, Senator Heinz, *see The Victims of Crime Assistance Act of 1984: Hearings on S. 2423 Before the Senate Comm. on the Judiciary,* 98th Cong., 2d Sess. 21 (1984) [hereinafter *Hearings*], demonstrate that the special assessment was in part intended to contribute to a fund to help defray the costs of eligible state criminal victim assistance programs. *See* 42 U.S.C. §§ 10601(b)(2), 10602. Had the proceeds been clearly confined to this purpose, the bill might well have passed constitutional muster. Its purpose might have been held not to be the raising of revenue, despite the fact that the goal of funding state criminal victim assistance programs could have been accomplished only

by the raising of revenue. *See, e.g., Millard,* 202 U.S. at 436-37, 26 S.Ct. at 675 (holding that a bill providing payment to a railway company of money raised by a tax on District property was not a revenue raising bill within the compass of the origination clause); *cf. Sperry,* 12 Cl.Ct. at 742-43 (upholding against an origination clause challenge an act that authorized deductions from awards of the Iran Claims Tribunal because the purpose of the act was to expedite the settlement of claims against Iran and to shift the cost of maintaining the tribunal to those who benefit most from it).

However, as the underlined passage of the statement of purpose indicates, Congress contemplated that the revenue might be used as general federal revenue.[5] In addition, Congress failed to restrict the use of the monies assessed under section 3013 in any way, so that they might be shifted to another purpose at any time. A final indication of the fact that the special assessment's main purpose was not to fund victim assistance programs is the concession by Congress in its statement of purpose that only small amounts would be collected by the assessments.

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[5] The testimony of Lois Herrington, Assistant Attorney General, before the Senate Judiciary Committee also supports this position. When asked about the administration's position on the proposed special assessments, Herrington stated:

> Well, when we first looked into this on the task force, we looked into the size of the source of the funding and whether it would be really worthwhile to go after this, how much it would cost us to get it. We figured out it would be approximately $2 million as a fund. *There are also several other proposals within the Department of Justice looking into how to use it in the criminal justice area.* Because of the increase in the fine collection in the last year, we did not use this as a source of funding. It is a very small amount in the total fine collection.

Hearings, supra, at 36 (emphasis added).

The government urges that we find the purpose of the special assessment to be the punishment of offenders, rather than the collection of revenue. A number of arguments are offered in support of this position. First, in the legislative history, the assessment is referred to as a "penalty assessment." Second, the special assessment is levied only on convicted persons. Third, several circuits have held the special assessments to be penal in nature. We find these arguments unpersuasive, and address them in turn.

First, the term used to refer to the assessment does not determine its purpose. "Penalties" are defined functionally, by their effect, rather than by the word used to describe them. If the special assessment is intended to raise revenue for government use, rather than to punish offenders, the name by which it is called is irrelevant. *See United States v. La Franca,* 282 U.S. 568, 572, 51 S.Ct. 278, 280, 75 L.Ed. 551 (1931). In addition, although the Senate hearing report, S.Rep. No. 497, *supra,* at 5, 13, 1984 U.S.Code Cong. & Admin.News, at 3611, 3619 and the original bill used the term "penalty assessment," the word "penalty" does not appear in the codified version of the statute. Instead, the term "special assessment" is used. 18 U.S.C. § 3013. This suggests that Congress, by altering the reference, may not have conceived of the assessment, at least in its final form, as a penalty. Finally, as discussed above, the legislative statement of purpose does not mention punishment as a purpose of the special assessment.

Second, the fact that the special assessment exacts money only from convicted persons does not necessitate that its purpose be punitive. The special assessment could also be interpreted as an expression of Congress' power to tax under art. 1, § 8 of the Constitution. "[T]he Framers did not intend to restrict Congress' ability to define the class of objects to be taxed." *United States v. Ptasynski,*

462 U.S. 74, 82, 103 S.Ct. 2239, 2244, 76 L.Ed.2d 427 (1983). Therefore, a levy on the class of convicted persons may be a tax, rather than a penalty.

Third, although a number of courts have found the special assessment statute to be punitive, all but one decision involved contexts other than the origination clause. *See United States v. Mayberry,* 774 F.2d 1018 (10th Cir.1985) (holding that the special assessment is a form of punishment for purposes of the Assimilative Crimes Act); *United States v. Davis,* 845 F.2d 94, 97 n. 2 (5th Cir.1988) (same); *United States v. King,* 824 F.2d 313, 317 (4th Cir.1987) (interpreting *Ray v. United States,* 481 U.S. 736, 107 S.Ct. 2093, 95 L.Ed.2d 693 (1987) (to imply that the special assessment was punitive, and therefore constituted punishment for purposes of the Assimilative Crimes Act). *But cf. United States v. Donaldson,* 797 F.2d 125, 127 (3d Cir.1986) (finding that rule of lenity does not govern the interpretation of § 3013, because the statute is not criminal, as the purpose of the section is to raise revenue to support state crime victim compensation programs); *United States v. Dobbins,* 807 F.2d 130 (8th Cir.1986) (same).

These courts, in evaluating the purpose of section 3013 in light of challenges that did not involve the origination clause, unsurprisingly failed to perform the purpose analysis mandated by the origination clause. The importance of that failure can be seen by examining a decision of this court. In *United States v. Smith,* 818 F.2d 687 (9th Cir.1987), the Ninth Circuit held that the Congress intended section 3013 to be "a punitive measure designed to raise some revenue," concluding that "[a] punitive measure designed to raise revenue is still a punitive measure." *Id.* at 690. *Smith* is distinguishable from the present case, however, because the determination that the special assessment was a punishment was relevant only in determining that its

imposition on the defendants without resort to a jury trial did not violate their seventh amendments rights. The court did not explore the further constitutional implications of the finding that "Congress undeniably intended section 3013 assessments to produce revenue." *Id. Smith* did not determine the "primary purpose" of the special assessment nor did it consider whether it was a tax within the meaning of the origination clause.

We decline to follow the one case that rejected an origination clause challenge to section 3013, holding that section 3013 was punitive for purposes of the origination clause. *See United States v. Ramos*, 624 F.Supp. 970, 973 (S.D.N.Y.1985). *Ramos* conducted a one-paragraph analysis of the origination clause issue and adopted the holding of *Mayberry* that the measure was punitive, ignoring the fact that *Mayberry* did not involve an origination clause challenge.

We conclude, therefore, that for purposes of the origination clause the primary purpose of the special assessment was to raise revenue, not to finance state victim assistance programs or to punish offenders. Because section 3013 is a bill for raising revenue, the Constitution requires that the special assessment legislation have originated in the House of Representatives. We will now examine the legislative history to determine whether the legislation complied with this prescription.

B. ***In Which House Did Section 3013 Originate?***

Although the parliamentary history of section 3013 is somewhat complex, it clearly indicates that section 3013 originated in the Senate. The history of the bill's passage is in general outline as follows. *See generally The Crime Control and Fine Enforcement Acts of 1984: A Synopsis*, Federal Judicial Center (1985) (summarizing the Comprehensive Crime Control Act's legislative history).

On May 1, 1984, in hearings on S. 2423, the Victim of Crime Assistance Act of 1984, before the Senate Committee on the Judiciary, Senator John Heinz proposed a provision allowing for the collection of "penalty assessments" from convicted persons. *See Hearings, supra,* at 21. On May 10, 1984, the Committee on the Judiciary ordered the bill reported, including the newly added section authorizing the collection of special assessments. *See* S.Rep. No. 497, *supra,* at 3, 1984 U.S.Code Cong. & Admin.News, at 3609. The Senate passed S. 2423 on August 10, 1984. *See* 1984 U.S.Code Cong. & Admin.News 3607. This bill was never passed by the House. However, on October 4, 1984, the Senate added the text of the Victims of Crime Assistance Act of 1984, including the special assessment provision, to a joint resolution making continuing appropriations for the fiscal year 1985 (H.J.Res. 648). Thurmond Amendment No. 7043, 98th Cong., 2d Sess., 130 Cong. Rec. S13,520, S13,544 (daily ed. Oct. 4, 1984). Although H.J.Res. 648 had been approved by the House on September 28, 1984, as passed by the House the joint resolution contained no provision relating to special assessments. *See* Joint Explanatory Statement of the Committee of Conference, 1984 U.S.Code Cong. & Admin.News 3710, 3713-14. The provision establishing the special assessments ultimately became part of the Comprehensive Crime Control Act of 1984, itself forming one of many unrelated titles in H.J.Res. 648 as adopted by the House on October 10, 1984 pursuant to the conference agreement. *See id.* The Senate passed the modified version of H.J.Res. 648 on October 11, 1984, and the bill became law on October 12, 1984 (Pub.L. No. 98-473).

Although section 3013 ultimately passed both houses of Congress as a minor component of the continuing appropriations resolution for 1985, the Senate clearly initiated the special assessment legislation. The special assessment

provision was introduced in the Senate Judiciary Committee, it was first passed by the Senate and was only adopted by the House on later repassage of H.J.Res. 648. Based on this reading of the legislative history, we hold that section 3013 originated in the Senate.

C. *Can the Senate's Passage of Section 3013 be Construed as a Permissible Germane Amendment of a House Revenue Bill?*

Our holdings that section 3013 is a revenue bill and that it originated in the Senate do not require that we find the legislation violative of the origination clause. The Constitution permits the Senate to "propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7. However, the power of the Senate to amend a bill originating in the House is not unlimited. The Senate's amendment must be germane to the subject matter of the House bill. *See Flint,* 220 U.S. at 143, 31 S.Ct. at 346; *Armstrong,* 759 F.2d at 1381. The Senate has conceded that the Senate's authority to attach revenue-raising amendments to House bills applies only to revenue bills. 2 Hinds' Precedents of the House of Representatives of the United States § 1489 (1907); *see also Armstrong,* 759 F.2d at 1382. ("[O]nce a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments").

House joint resolution 648 did not deal with the raising of revenue. As the district court correctly noted, "the subject matter of the House bill in this case was crime control – not raising revenue. Thus, regardless of the effect of the 'amendment,' the 'amended portion' of the legislation did not address revenue collection. . . ." *United States v. Munoz-Flores,* Crim. No. 85-0509-E (S.D.Ca. Aug. 6, 1986) (memorandum decision) at 7 n. 3. The Senate's amendment relating to revenue raising was not an amendment to a revenue bill within the meaning of the origination clause.

III.

CONCLUSION

Statutes should be construed to avoid constitutional questions; however, this tenet of statutory construction is not a license for the judiciary to overlook procedural errors by the legislative branch that violate the Constitution. *Cf. United States v. Albertini,* 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536 (1985) (judiciary may not rewrite language enacted by the legislature to avoid a constitutional question).

The primary purpose of section 3013 is revenue raising; the legislation originated in the Senate, and the special assessment cannot be interpreted as an amendment of a House revenue bill. We therefore find that the special assessment is violative of article I, § 7. As such, the special assessment is "not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U.S. 425, 442, 6 S.Ct. 1121, 1125, 30 L.Ed. 178 (1886).

Because we hold that the special assessment on convicted persons is unconstitutional, we do not reach other issues raised by Munoz.

SENTENCE VACATED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Crim. No. 85-0509-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERMAN MUNOZ-FLORES (07), DEFENDANT

MEMORANDUM DECISION

[Entered Aug. 11, 1986]

BACKGROUND

Defendant and several codefendants were charged in a two count indictment with aiding and abetting in the transportation of illegal aliens. Prior to trial, the United States and defendant Munoz-Flores entered into a plea agreement, and the defendant consented to the jurisdiction of the magistrate's court.

Pursuant to the government's recommendation, Magistrate Gonzalez ordered a suspended sentence on both counts and placed the defendant on two years of unsupervised probation. The disposition and sentencing took place on September 20, 1985. A transcript of the proceedings is in the file before this court.

In addition to ordering probation, Magistrate Gonzalez ordered the defendant to pay two $25.00 special assessment penalties. The order reflected defendant's conviction on two misdemeanor counts.

Counsel for defendant objected to the special assessments, arguing that there should be only one special assessment penalty per offense. Magistrate Gonzalez overruled the objection and the defendant paid both special assessment penalties.

The judgment and commitment against defendant, which included the special assessments, was filed on September 30, 1985. Defendant did not appeal. However, on October 15, 1985, defendant filed a Rule 35 motion to correct the sentence. Fed. R. Crim. P. 35.

In his Rule 35 motion, defendant raised three objections to Magistrate Gonzalez' imposition of sentence:

(1) 18 U.S.C. § 3013 (1982), authorizing special assessment penalties, is a revenue raising statute that unconstitutionally originated in the United States Senate.
(2) Multiple assessments may not be imposed for a single transaction or offense, regardless of the number of counts in the indictment.
(3) Special assessment penalties may not be imposed for petty offenses.

On December 11, 1985, Magistrate Gonzalez denied defendant's motion. The defendant now appeals the magistrate's denial of the Rule 35 motion, urging the same three legal questions that were presented below. This court has jurisdiction over the appeal pursuant to 18 U.S.C. § 3402.

DISCUSSION

I.

Constitutionality of § 3013

Defendant attacks the constitutionality of § 3013, 18 U.S.C. § 3013, based on the origination clause of the Constitution. U.S. Const. art. I, § 7, cl. 1. The origination clause provides:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

The language of section 3013 does not itself indicate whether the statute is intended to raise revenue or was passed for other purposes. Section 3013 states:

> The court shall assess on any person convicted of an offense against the United States –
>
> (1) in the case of a misdemeanor –
>
> (A) the amount of $25 if the defendant is an individual . . .
>
> Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

18 U.S.C. § 3013 (1982).

It is well established that the origination clause does not invalidate statutes that are primarily regulatory or penal, but which raise revenue incidentally. Thus, the origination clause is directed at statutes that levy a tax.[1] The Court of Appeals for the Fourth Circuit recently summarized:

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[1] Defendant relies on two district court cases that concerned states' competence to tax federal institutions. *United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981); *United States v. Maryland*, 471 F. Supp. 1030 (D. Md. 1979). These cases address the distinction between a fee and a tax; although pertinent these cases are not dispositive concerning whether section 3013 has a primary purpose other than raising revenue.

> The deduction, however, is not a tax. The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised. *Head Money Cases*, 112 U.S. 580, 5 S. Ct. 247, 28 L.Ed. 798 (1884). The imposition of assessments have long been held to be a legitimate means of regulating commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942). If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. *United States v. Strangeland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943).

State of South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983).

Chapter XIV of the Crime Control Act of 1984 established the Crime Victims' Assistance Fund to provide compensation and assistance for programs for crime victims. The Fund accrues money from (1) all criminal fines from federal cases, (2) contributions from the public, (3) "all penalty assessment fees imposed by a Federal court upon conviction pursuant to Title II of the Act [section 3013]," and (4) royalties paid to convicts.

Title II, containing section 3013, is denominated "Penalty Assessment Fines." The Senate Report covering its passage explains:

> Section 101 requires and prescribes penalty assessment fees to be imposed by the Federal courts upon defendants convicted of offenses. The penalty fee for individual defendants is $25 for a misdemeanor conviction and $50 for a felony conviction . . . The Committee's amendment added this title to the bill based on a suggestion from Senator Heinz. [Footnote omitted]. The purpose of imposing nominal assess-

> ment fees is to generate needed income to offset the cost of the new programs authorized under S. 2423. Although substantial amounts will not result, these additional amounts will be helpful in financing the program and will constitute new income for the Federal government.

S. Rep. 98-497, at 13-14, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code & Cong. Ad. News p. 3607, 3619-20. The Senate Report also addresses the cost of the new legislation. It summarizes:

> While the bill would authorize new spending, the increased fines, improved collections, penalty assessment fees, and public donations could conceivably offset much of that spending authority.

Id. at 3627.

Thus, the language and the legislative history of section 3013 are somewhat ambiguous. There are continual references to the special assessments as a "penalty," yet the funds generated were clearly viewed as an important monetary source for the Crime Victims' Assistance Fund.[2]

The Court of Appeals for the Tenth Circuit recently examined section 3013 to determine if special assessment penalties should be applied to crimes charged under the Assimilative Crimes Act, 18 U.S.C. § 13 (1982). *United States v. Mayberry*, 774 F.2d 1018 (10th Cir. 1985). Specifically, the court held that special assessment penalties are "penal in nature," and that the imposition of such an

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[2] The Federal Judicial Center published a comprehensive review of the Crime Control Act. It included a summary of the Senate Report prepared in conjunction with section 3013, summarizing: "[The Senate Report] indicates that the purpose of the special assessment is to raise revenue, but includes no interpretive commentary." Federal Judicial Center, The Crime Control and Fine Enforcement Acts of 1984: A Synopsis, at 38 (1984).

assessment represents "an additional penalty on those who commit state crimes on federal enclaves." *Id.* at 1021.

Four factors supported the *Mayberry* court's conclusion that special assessments were penal: (1) the assessment placed an additional burden or penalty on the defendant; (2) the assessment could only be imposed after conviction for a crime; (3) the assessment is higher for felonies than for misdemeanors, so that the punishment is tailored to the crime; and (4) the assessments are collected in the same manner as criminal fines, so that the "practical effect . . . is to make the assessment indistinguishable from a criminal fine." *Id.*

The *Mayberry* court also examined the legislative history of section 3013, concluding:

> Despite the fact that the section's stated purpose is to assist victims of criminal activity by establishing a relief fund, there can be little doubt that Congress understood the assessment to be at least partially punitive. In this regard, we note the Senate Report, which accompanied Senate Bill 2423, acknowledges that income generated through the assessment will not be substantial. [Citation omitted]. Such a statement casts doubt upon the notion that the Act's sole purpose was to raise revenue. We also point out that the same purpose—raising revenue to offset the costs of the victims relief program—was attributed to the fine increase section of the 1984 Crime Act. [Citation omitted]. Moreover, we think it of some import that the actual provision of [section 3013] entitles the section "Penalty Assessment," [citation omitted]; the Senate Report accompanying the bill refers to the assessment as a "penalty fee" and as "penalties"; and the Senate Report terms the section "Penalty Assessment Fines." [Citation omitted].

Id.

The defendant acknowledges *Mayberry,* but argues that this court should not be persuaded by the Tenth Circuit's reasoning. Defendant recites the four factors that *Mayberry* considered and attempts to refute each. Thus, defendant urges that (1) additional burdens are not necessarily penal, (2) special assessments are not a sentencing tool that necessarily increase with more serious crimes, (3) the goal of victim assistance programs is to benefit the public at large rather than to punish the defendant, and (4) the manner of collection should not affect the statutory characterization.

Although these distinctions have some merit, this court finds the Tenth Circuit's reasoning more compelling, and is therefore convinced that section 3013 is penal in nature. The revenue raising character of the statute is incidental and it was properly proposed in the Senate.[3] Accordingly, the magistrate's order is affirmed.

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[3] As an additional basis to support constitutionality, the United States correctly notes that if a bill or amendment proposed by the Senate is "germane to the subject matter" of House legislation raising revenue, inclusion does not offend the origination clause. *Texas Association of Concerned Taxpayers, Inc. v. United States,* 772 F.2d 163 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 2265 (1986); *Armstrong v. United States,* 759 F.2d 1378 (9th Cir. 1985). However, as noted by the Fifth Circuit,

> "[s]ubject matter" appears to merely require that *both the amendment and the amended portion address revenue collection* [Citations omitted]. The Senate's amendment, adding new taxes, was germane to the subject matter and thus within the range of amendments permitted by the origination clause. [Emphasis added].

Texas Association of Concerned Taxpayers, Inc., 772 F.2d at 168. In *Armstrong,* 759 F.2d at 1382, the Ninth Circuit stated:

> we also conclude that once a *revenue bill* has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform a proposal lowering taxes into one raising taxes. [Emphasis added].

In both cases, the legislation that originated in the House was primarily concerned with raising revenue, as were the Senate amendments. In contrast, the subject matter of the House bill in this case was crime control – not raising revenue. Thus, regardless of the effect of the "amendment," the "amended portion" of the legislation did not address revenue collection and this argument is incorrectly applied to section 3013.

II.

Number of Special Assessments

Defendant's second ground for appeal is the magistrate's imposition of two special assessment penalties. There were two counts in the indictment, which arose from one transaction.

The Court of Appeals for the Second Circuit recently rejected this argument, and the reasoning of that court is convincing. In *United States v. Pagen,* 785 F.2d 378, 381 (2d Cir. 1986), the court stated:

> We reject the notion . . . that section 3013 can reasonably be construed to require the imposition of only one assessment on a given defendant at a time, no matter on how many counts he may have been convicted. Such a reading is illogical. If a defendant were simultaneously convicted on one misdemeanor and one felony, the clear language of section 3013 would require separate $25 and $50 assessments. That being true, it cannot be supposed that Congress intended that the same defendant could be convicted simultaneously of several felonies and be subject only to a single $50 assessment. It is also unlikely that Congress would predicate the imposition of single or multiple assessments, based upon convictions for "an offense," upon the happenstance that an offense may

> be tried by itself or in combination with several other offenses. Furthermore, because money collected under section 3013 is paid into a Crime Victims' Fund [citation omitted], it is reasonable to conclude that Congress, aware that multiple offenses would often entail multiple victims, intended that there should be a separate assessment for each offense.

Id. at 381.

The reasoning in *Pagen* is sound and well supported by the language and the legislative history of section 3013. Accordingly, this court finds that section 3013 authorizes imposition of a special assessment penalty for each count on which the defendant was convicted.[4] The magistrate's imposition of two special assessment penalties is therefore affirmed.

III.

Petty Offenses

Defendant contends that special assessment penalties cannot be applied to petty offenses. However, the plain language of the statute refutes this contention.

Section 3013 mandates imposition of a special assessment penalty for any misdemeanor. 18 U.S.C. § 1(3) defines a petty offense as

> *[a]ny misdemeanor,* the penalty for which . . . does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual . . . is a petty offense. [Emphasis added].

[4] The Federal Judicial Center commentary on section 3013 also concludes that "[t]he assessment requirement probably applies separately to each count for which a defendant could be punished." Federal Judicial Center, The Crime Control and Fine Enforcement Acts of 1984, A Synopsis, at 39.

Thus, special assessment penalties apply to misdemeanors that also happen to be defined as petty offenses.

CONCLUSION

Upon due consideration of the parties' memoranda, the arguments advanced at hearing and for the reasons set forth herein, this court affirms the magistrate's denial of defendant's motion under Fed. R. Crim. P. 35 for correction of an illegal sentence.

DATED: August 6, 1986.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Crim. No. 85-0509-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERMAN MUNOZ-FLORES (07), DEFENDANT

[Entered Aug. 11, 1986]

ORDER

Pursuant to this court's Memorandum Decision dated August 6, 1986, the order of the magistrate denying defendant's motion under Fed. R. Crim. P. 35 for correction of an illegal sentence is hereby affirmed.

IT IS SO ORDERED.

DATED: August 6, 1986.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 85-509-E

UNITED STATES OF AMERICA

v.

GERMAN MUNOZ-FLORES (01)

[Filed Sep. 30, 1985]

JUDGMENT AND COMMITMENT

On this 20th day of September, 1985 came the attorney for the government and the defendant appeared in person and by counsel, Federal Defenders, Inc., by Judy Clarke.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of [*sic*] did knowingly aid and assist an undocumented alien, who was then and there an alien, to elude examination and inspection by Immigration officials of the U.S. in violation of Title 8, United States Code, Section 1325, and Title 18, United States Code, Section 2, as charged in Count One and Count Two of the superseding Information, and the magistrate having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUGED that as to Count One, the imposition of the sentence as to incarceration is suspended and the defendant is placed on unsupervised probation for a period of two (2) years, upon the following terms and conditions of probation: 1) that he obey all laws, state, federal and local; 2) that he maintain employment; (3) that he not transport anyone be believes to be an illegal alien.

IT IS ADJUDGED that as to Count Two, the imposition of the sentence as to incarceration is suspended and the defendant is placed on unsupervised probation for a period of two (2) years, upon the same terms and conditions imposed in Count One.

IT IS ADJUDGED that the remaining charges are dismissed and that the defendant shall pay a Penalty Assessment of $25 as to Count One and $25 as to Count Two pursuant to 18 USC 3013.

/s/ Irma E. Gonzalez
United States Magistrate

Filed: 9/20/85

WILLIAM W. LUDDY, Clerk

By: Dawn Y. Irame
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5236
DC No. 85-0509-E (IEG)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERMAN MUNOZ-FLORES (07), DEFENDANT-APPELLANT

[Filed Mar. 29, 1989]

ORDER

Before: WRIGHT, FERGUSON, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc, and Judges Wright and Ferguson have so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-5236
DC No. CR 85-0509-7-E

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERMAN MUNOZ-FLORES, DEFENDANT-APPELLANT

[Filed Apr. 13, 1989]

ORDER

Before: WRIGHT, FERGUSON, and O'SCANNLAIN, Circuit Judges.

Plaintiff-Appellee's motion to stay the mandate pending application to the Supreme Court for certiorari is GRANTED.

APPENDIX G

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 85-0509-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERMAN MUNOZ-FLORES (07) ET AL., DEFENDANTS

INFORMATION
Superseding

Title 8, U.S.C., Sec. 1325;
Title 18, U.S.C., Sec. 2 –
Aiding and Abetting Illegal Entry

The United States Attorney charges:

COUNT ONE

That on or about February 26, 1985, within the Southern District of California, defendant GERMAN MUNOZ-FLORES, at a point in San Diego County, California, did knowingly aid and assist an undocumented alien, who was then and there an alien, to elude examination and inspection by immigration officials of the United States; in violation of Title 8, United States Code, Section 1325, and Title 18, United States Code, Section 2.

COUNT TWO

On or about February 26, 1985, within the Southern District of California, defendant GERMAN MUNOZ-FLORES, at a point in San Diego County, California, did knowingly aid and assist an undocumented alien, who was then and there an alien, to elude examination and inspection by immigration officials of the United States; in violation of Title 8, United States Code, Section 1325, and Title 18, United States Code, Section 2.

DATED: September 20, 1985

Respectfully submitted,

PETER K. NUNEZ
United States Attorney

LYNNE R. LASRY
Assistant U.S. Attorney

APPENDIX H

The current version of 18 U.S.C. 3013, as amended by the Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 3, 101 Stat. 1279 (adding new subsections (c) and (d) to § 3013), and by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7082, 7085, 102 Stat. 4407, 4408 (adding second sentence to § 3013(c) and amending § 3013(a)(1)), provides:

§ 3013. Special assessment on convicted persons

(a) The court shall assess on any person convicted of an offense against the United States –

(1) in the case of an infraction or a misdemeanor –

(A) if the defendant is an individual –

(i) the amount of $5 in the case of an infraction or a class C misdemeanor;

(ii) the amount of $10 in the case of a class B misdemeanor; and

(iii) the amount of $25 in the case of a class A misdemeanor; and

(B) if the defendant is a person other than an individual –

(i) the amount of $25 in the case of a infraction or a class C misdemeanor;

(ii) the amount of $50 in the case of a class B misdemeanor; and

(iii) the amount of $125 in the case of a class A misdemeanor.

(2) in the case of a felony –

(A) the amount of $50 if the defendant is an individual; and

(B) the amount of $200 if the defendant is a person other than an individual.

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

(c) The obligation to pay an assessment ceases five years after the date of the judgment. This subsection shall apply to all assessments irrespective of the date of imposition.

(d) For the purposes of this section, an offense under section 13 of this title is an offense against the United States.

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1932

UNITED STATES OF AMERICA,

PETITIONER,

-vs-

GERMAN MUNOZ-FLORES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S MEMORANDUM IN OPPOSITION

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Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1932

UNITED STATES OF AMERICA,

PETITIONER,

-vs-

GERMAN MUNOZ-FLORES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S MEMORANDUM IN OPPOSITION

Respondent, German Munoz-Florez, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 863 F.2d 654.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The fact that the decision below conflicts with several district court decisions outside the Ninth Circuit is an inadequate reason for granting a petition for writ of certiorari.

To date, the Ninth Circuit Court of Appeals is the only circuit court to address the constitutionality of the Special Assessments provision (18 U.S.C. § 3013) under the Origination Clause. Petitioner is correct that district courts in other circuits have split on the validity of section 3013 and that appeals are pending before several circuit courts of appeal.

(Pet. 11-12.) Rule 17 of the Rules of the Supreme Court of the United States does not provide for the granting of a petition for writ of certorari where there is a split in the district courts.

2. The decision below is not in conflict with other circuit court decisions interpreting section 3013.

Petitioner cites two circuit court decisions that concluded section 3013 was designed to provide funds for the Crime Victims Assistance Program. (See Pet. 12, citing United States v. Donaldson, 797 F.2d 125, 127 (3d Cir. 1986); United States v. Dobbins, 807 F.2d 130 (8th Cir. 1986). Both Donaldson and Dobbins are consistent with the decision below in finding that section 3013 is not a punitive measure. The issue in Donaldson and Dobbins was not the Origination Clause but whether section 3013 was a criminal statute entitled to application of the rule of lenity.

Donaldson, upon which Dobbins relied, found that section 3013 did not define a substantive criminal offense or establish a criminal sentence but rather assessed nominal amounts that were to be paid into the Crime Victim's Fund. 797 F.2d at 127; 807 F.2d at 131. Consistent with both Donaldson and Dobbins, the Ninth Circuit found the provision was not to punish offenders. (Pet. 10a, 12a.)

Petitioner also cites three circuit decisions that have concluded assessments under section 3013 were punitive. See Pet. 12, citing United States v. Davis, 845 F.2d 94, 97, n.2 (5th Cir. 1988); United States v. King, 824 F.2d 313, 317 (4th Cir. 1987); United States v. Mayberry, 774 F.2d 1018 (10th Cir. 1985).[1] These cases all concern the applicability of section 3013 assessments to convictions under the Assimilative Crimes Act. While each these cases did conclude that section 3013 was punitive, the issue was the Assimilative Crimes Act, not the Origination Clause.

1/ Interestingly, the government argued in both King and Mayberry that the assessment was not punishment.

Both King and Davis found the provision punitive for purposes of an Assimilative Crimes Act analysis but refused to decide whether it would be punitive for a rule of lenity analysis. 845 F.2d at 97, n.2; 824 F.2d at 316. The Mayberry court relied on its finding that the provision was "at least partially punitive" and that there was doubt that the sole purpose of the Act was to raise revenue. 774 F.2d at 1021. None of these decisions conflict with the decision below in that none of the courts were confronted with making a decision regarding the "primary purpose" of the assessment provision.

It is noteworthy that the decisions regarding the Assimilative Crimes Act have been rendered a nullity by Pub. L. 100-185 that amended section 3013 to provide

> (d) For purposes of this section, an offense under section 13 of this Title [The Assimilative Crimes Act] is an offense against the United States.

18 U.S.C. 3013 (as amended 1987).

3. The Court of Appeals properly applied this Court's Origination Clause decisions.

The Court of Appeals properly recognized that decisions of this Court hold that Origination Clause constraints do not extend to bills that incidentally create revenue. Pet. 6a, citing Millard v. Roberts, 202 U.S. at 436; Twin City Bank v. Nebeker, 167 U.S. at 202; United States v. Norton, 91 U.S. at 569. Those cases were properly interpreted by the Ninth Circuit to require consideration of the purpose of the special assessments legislation.

A revenue measure is one whose "direct and avowed purpose" is to "create [] revenue or public funds for the service of the government." United States v. Norton, 91 U.S. 566, 569 (1876). A revenue measure may have an incidental punitive or regulatory effect, and a regulatory or punitive measure may incidentally raise money. See generally, L. Tribe, American Constitutional Law, 319-20 (1988). The test is whether the measure raises revenue for the sake of raising revenue for governmental use, or

whether it raises revenue in the course of providing some service or achieving some proper regulatory end. When exercising powers other than the power to tax, Congress may, in establishing a government program of regulation or service, provide for the collection of fees to fund the program. Such fees are not authorized by the power to tax, but by the Article I power that authorizes the underlying Congressional action and are therefore not revenue measures. Twin City National Bank v. Nebeker, 167 U.S. 196 (1897) (Harlan, J.).

It is true that Congress provided for special assessments to be deposited into the Victims Assistance Fund. 42 U.S.C. § 10601(b)(2). Congress also mandated that "[i]f the total deposited in the fund during a fiscal year reaches the sum of $110 million, the excess over that fund shall be deposited in the general fund of the treasury and shall not be a part of the Fund."[2] 42 U.S.C. 10601(c(1). Congress therefore explicitly refused to place any ultimate limitation on use of the collected funds.

The legislative history also clarifies what the statutory language suggests:

> The purpose of imposing nominal assessment fees is to generate needed income to offset the cost of the [Crime Victims Fund . . . . Although substantial amounts will not result, these additional amounts will be helpful in financing the program and will constitute new income for the federal government.

S. Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 3607 (emphasis added). Raising money cannot be a mere incidental effect of the program to assist crime victims when Congress did not restrict the use of the monies, contemplated that the monies could be used for other purposes, and, by setting the assessment so low, could not have intended that a Crime Victims Fund would be meaningfully funded by the assets.

2/ The cap was raised by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7121(a), 7129. See Petition 16, n.12.

4. The Special Assessment provision originated in the Senate.

There appears to be agreement that the Special Assessment provision enacted into law on October 12, 1984, was part of a Victims of Crime Assistance Bill which was added to the Comprehensive Crime Control Act of 1984. The Comprehensive Crime Control Act of 1984 was one of many unrelated titles of H.R.J. Res. 648, enacted as Pub. L. 473. At the time that H.R.J. Res. 648 was passed by the House (Sept. 28, 1984), it did not include a special assessment provision. The amendment adding a special assessment provision was tacked on by the Senate on October 4, 1984 (130 Cong. Rec. S13,520, S13,544). On October 10, 1984, the House adopted a version of the Bill, including the Senate amendments and the Senate passed it on October 11, 1984. The final version of H.R.J. Res. 648 became law on October 12, 1984.

The critical inquiry is which house voted first on the actual measure which did pass the Congress. Petitioner focuses on the language of H.R. 5690, a House bill that was passed by the House on October 2, 1984, which contains the precise special assessment language ultimately added by the Senate to H.R.J. Res. 648. However, H.R. 5690 never became law. Petitioner chooses to ignore that the Senate was the first body to pass any form of a special assessment provision which it did in S.2423 on August 10, 1984. See 1984 U.S. Code Cong. & Admin. News 3609. In actuality, the legislative history indicates the Senate's amendment to H.R.J. Res. 648 (which added the special assessments provision) was based upon legislation introduced by Senator Heinz on March 8, 1983. See 129th Cong. Rec. S.704 (daily ed. Mar. 8, 1983). The first such House initiative was introduced by H.R. 3498 on June 30, 1983.

There is no dispute that the special assessment provision of H.R.J. Res. 648 was first added by the Senate. This is precisely what is prohibited by the Origination Clause.[3]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Judy Clarke

Dated: June 29, 1989

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3/ Even if the focus is on which House first passed the particular measure that was ultimately enacted, it is clear that the Senate "initiated" special assessment legislation as far back as March 8, 1983 and was indeed the first body to pass any such legislation. Petitioner cannot have it both ways -- if predecessor legislation is relevant to inquiry under the Origination Clause, the first such legislation to be passed was S.2423.

FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1932

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

KENNETH W. STARR
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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1932

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our petition for a writ of certiorari, we pointed out that the question presented in this case—whether 18 U.S.C. 3013 (Supp. IV 1986) was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1—was presented in a number of cases pending before the courts of appeals and that several district courts had already rejected the Ninth Circuit's view on the question. Pet. 11-12. The Second, Third, and Sixth Circuits have now held that Section

3013 is valid under the Origination Clause, squarely rejecting the Ninth Circuit's view.*

In *United States* v. *Griffin*, No. 89-1105 (Aug. 29, 1989), and companion cases, the Second Circuit ruled that Section 3013 was not enacted for the purpose of raising revenue within the meaning of the Origination Clause. Explaining that the special assessments imposed under Section 3013 were intended to be, and are in fact imposed as, part of the criminal sentence, the court concluded that the assessments are penalties rather than taxes. Slip op. 3-6. Accordingly, the court held that the defendants' Origination Clause challenge was without merit regardless of whether Section 3013 originated in the House or in the Senate. Slip op. 3. The court expressly recognized (*id.* at 5a) that its ruling was contrary to that of the Ninth Circuit in *United States* v. *Munoz-Flores*, 863 F.2d 654 (1988), the decision that we ask this Court to review in our petition for a writ of certiorari in the present case.

In *United States* v. *Simpson*, No. 89-3180 (Sept. 5, 1989), and companion cases, the Third Circuit likewise held that Section 3013 was not enacted to raise revenue within the meaning of the Origination Clause. After ruling that the defendants' Origination Clause challenge presented a justiciable question (slip op. 7-10), the court concluded that Congress enacted Section 3013 for the purpose of defraying the costs of victim-assistance programs, not to raise revenue for the general use of the government (slip op. 10-21). The court disagreed with both the holding and the reasoning of the Ninth Circuit in *Munoz-Flores*. Slip. op. 14-21.

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* Ten copies of the recent court of appeals decisions have been lodged with the Clerk of this Court.

In *United States* v. *Ashburn*, No. 89-3227 (Sept. 7, 1989), the Sixth Circuit similarly held that Section 3013 was not enacted for the purpose of raising revenue within the meaning of the Origination Clause. The court concluded that the assessments imposed under Section 3013 are essentially penalties, not taxes, and that any raising of revenue under the provision is in any event merely incidental to the provision's purpose of funding victim-assistance programs. Slip op. 3-5. The court expressly disagreed with the Ninth Circuit's ruling in *Munoz-Flores*. Slip op. 5.

In short, there is now a conflict between the Second, Third, and Sixth Circuits, on one side, and the Ninth Circuit, on the other, on the question presented in this case. Cases that present the issue are currently awaiting decision in several other circuits. For those reasons, and for the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

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No. 88-1932

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 3013 (Supp. V 1987), which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1932

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 863 F.2d 654. The opinion of the district court (Pet. App. 16a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1988. A petition for rehearing was denied on March 29, 1989. The petition for a writ of certiorari was filed on May 30, 1989 (a Tuesday following a Monday holiday), and was granted on October 2, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Origination Clause of the United States Constitution, Art, I, § 7, Cl. 1, states:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section 3013 of Title 18, U.S. Code (Supp. V 1987), as enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, ch. XIV, § 1405(a), 98 Stat. 2174-2175, provided:

> **§ 3013. Special assessment on convicted persons**
>
> (a) The court shall assess on any person convicted of an offense against the United States –
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> (1) in the case of a misdemeanor –
>
> (A) the amount of $25 if the defendant is an individual; and
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> (B) the amount of $100 if the defendant is a person other than an individual; and
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> (2) in the case of a felony –
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

STATEMENT

1. Section 3013 of Title 18 imposes a special assessment on all persons convicted of federal offenses. It was enacted by Section 1405(a) of the Victims of Crime Act of 1984 (98 Stat. 2170-2178), which was part of H.R.J. Res. 648, 98th Cong., 2d Sess. (1984) (Act of Oct. 12, 1984,

Pub. L. No. 98-473, 98 Stat. 1837-2199). H.R.J. Res. 648 contained three Titles: Title I provided continuing appropriations for various government agencies and departments (98 Stat. 1837-1976); Title II enacted the Comprehensive Crime Control Act of 1984 (98 Stat. 1976-2194), of which the Victims of Crime Act of 1984 (98 Stat. 2170) was one of 23 chapters; and Title III established the President's Emergency Food Assistance Act of 1984 (98 Stat. 2194-2199).

The Victims of Crime Act of 1984 created a Crime Victims Fund in the Treasury (§ 1402(a)); authorized federal grants from the Crime Victims Fund to programs for compensating and assisting victims of crime (§§ 1403-1404); enumerated various sources of funding for the Crime Victims Fund, including the special assessments to be imposed pursuant to the simultaneously enacted Section 3013 (§ 1402(b)); and specified that, if the total amount in the Crime Victims Fund exceeded $100 million in any fiscal year, the excess would be deposited in the general fund of the Treasury (§ 1402(c)).[1] The President signed H.R.J. Res. 648 into law on October 12, 1984.

2. In June 1985, respondent and several other persons were indicted in the Southern District of California and charged with aiding the illegal entry of aliens, in violation of 8 U.S.C. 1324. Prior to trial, respondent entered into a plea agreement. Pursuant to the agreement, respondent pleaded guilty to a superseding information charging him with two misdemeanor counts of aiding and abetting aliens to elude examination and inspection by government officials, in violation of 8 U.S.C. 1325. Pet. App. 16a, 31a-32a.

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[1] The provisions regarding the Crime Victims Fund and the grants to state crime victims compensation and assistance programs were codified at 42 U.S.C. 10601-10603 (Supp. II 1984).

In accordance with the government's recommendation, the magistrate to whom the case was assigned suspended imposition of any prison sentence and placed respondent on two years' probation on each count. The magistrate also directed respondent to pay a $25 special assessment on each count under 18 U.S.C. 3013(a) (Supp. V 1987).[2] Pet. App. 16a-17a, 27a-28a.

3. On October 15, 1985, respondent filed a motion under Rule 35, Fed. R. Crim. P.,[3] asking the magistrate to correct an allegedly illegal sentence. Respondent's principal argument was that Section 3013, as enacted, was unconstitutional under the Origination Clause, Art. I, § 7, Cl. 1, because it was a "revenue raising statute that unconstitutionally originated in the United States Senate." Pet. App. 17a. The magistrate rejected the argument and denied the Rule 35 motion. C.A. Excerpt of Record 36-39.

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[2] Section 3013(a) was amended in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7082, 7085, 102 Stat. 4407, 4408; see Pet. App. 33a-34a (reproducing current version of Section 3013 and identifying amendments to 1984 version). The amendment, which refined the schedule of assessments for misdemeanors and infractions, does not apply in the present case, as the offenses, the prosecution, and the judgment all occurred in 1985. Under the current version of Section 3013, respondent's offenses, which would be Class B misdemeanors (18 U.S.C. 3559 (Supp. V 1987)), would result in assessments of only $10 per count. 18 U.S.C. 3013(a)(1)(A)(ii). The 1988 amendment did not alter the directive in Section 3013(a) that assessments shall be imposed on all persons convicted of a federal offense, and it did not affect the schedule of assessments in Section 3013(a)(2) for felonies.

[3] At the time, Rule 35(a) provided that "[t]he court may correct an illegal sentence at any time." Rule 35 was completely revised effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015-2016.

The district court affirmed. Pet. App. 16a-25a.[4] The court observed that it is "well established that the origination clause does not invalidate statutes that are primarily regulatory or penal, but which raise revenue incidentally." *Id.* at 18a. The court concluded that Section 3013 was primarily penal. The court relied on congressional descriptions of the assessments as penal and on *United States* v. *Mayberry*, 774 F.2d 1018 (1985), in which the Tenth Circuit held that Section 3013 was penal for purposes of the Assimilative Crimes Act, 18 U.S.C. 13. Pet. App. 18a-22a.[5]

4. The court of appeals took a contrary view; it held Section 3013 invalid under the Origination Clause. Accordingly, the Ninth Circuit ordered the two $25 assessments to be vacated. Pet. App. 1a-15a. The court first held respondent's Origination Clause challenge justiciable. *Id.* at 2a-4a. The court noted that the text of the Clause does not expressly commit its enforcement to the political branches, and the court concluded that the Clause contains judicially manageable standards. *Id.* at 3a-4a.

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[4] Like the magistrate, the district court rejected not only the Origination Clause challenge but respondent's additional arguments as well – that only one assessment could be imposed because his two offenses arose from a single transaction (Pet. App. 23a-24a), and that no special assessment could be imposed for a petty offense, such as his violation of 8 U.S.C. 1325 (Pet. App. 24a-25a).

[5] The Tenth Circuit held that, because Section 3013 assessments are penal, they are inapplicable to cases arising under the Assimilative Crimes Act, which states that persons who violate state criminal laws in certain areas within federal jurisdiction "shall be guilty of a like offense and subject to a like punishment" (18 U.S.C. 13). In 1987, Congress overruled *Mayberry* by adding subsection (d) to Section 3013, which specified that, for purposes of Section 3013, an offense under the Assimilative Crimes Act is "an offense against the United States" and thus subject to an assessment. See Pet. App. 34a.

Turning to the merits, the Ninth Circuit found that Section 3013 was enacted for the purpose of raising revenue, Pet. App. 6a-11a, and that the bill that became Section 3013 originated in the Senate, not the House. Pet. App. 12a-13a. The court also found (*id.* at 14a) that Section 3013 was not valid under the proviso to the Origination Clause, which states: "[B]ut the Senate may propose or concur with Amendments as on other Bills." The court observed that the Senate may attach an amendment to raise revenue to a House bill only if the House bill itself is a revenue-raising measure within the meaning of the Origination Clause. Here, the court concluded, the Senate added Section 3013 as an amendment to a House bill, but the court found that the House bill was not a bill for raising revenue and thus was not, under its analysis, validly amended by the revenue-raising Senate amendment.

SUMMARY OF ARGUMENT

1. An Origination Clause challenge to the constitutionality of a statute presents a nonjusticiable political question. The House of Representatives is fully capable of enforcing its prerogative under the Origination Clause; indeed, it has done exactly that on numerous occasions by sending legislation back to the Senate if the legislation is not in compliance with the House's origination role. The Origination Clause, moreover, does not extend constitutional protections to the citizenry generally or to some particular class of persons; it simply effects an internal allocation of authority between the House and Senate. The limited role of the Origination Clause suggests that origination is a prerogative of the House over which the House should enjoy the exclusive power of enforcement. Finally, the Origination Clause would be difficult for courts to apply. Courts would inescapably encounter difficulties—and potential disagreements with the House and Senate—in determining which bills are "Bills for raising Revenue" and in defining "origination." The task of making those decisions is more appropriately left by the Article III branch to the House and Senate to resolve in the course of performing their constitutional functions.

2. If the issue is determined to be justiciable, the Court should nonetheless hold that Section 3013 was not enacted in violation of the Origination Clause.

a. Section 3013 was not a "Bill[] for raising Revenue." For purposes of the Origination Clause, "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897). Passed as part of the Victims of Crime Act of 1984, Section 3013 has two primary purposes—assisting victims of crime and adding to the punishment of persons convicted of federal offenses. Section 3013 was not enacted to generate general revenue for the federal government, and thus was not a "Bill[] for raising Revenue" as the Court has interpreted the term.

b. Section 3013 did not originate in the Senate. On October 4, 1984, the Senate added the provision that became Section 3013 to a House joint resolution. Two days earlier, however, the House had passed a separate statute containing precisely the same language thereafter adopted on October 4 by the Senate. Because Section 3013, as ultimately enacted, contained the language that first appeared in the House bill of October 2, the statute is properly viewed as having originated in the House.

c. Even if Section 3013 was a "Bill[] for raising Revenue" and even if it originated in the Senate, the provision should nonetheless be viewed as a permissible Senate amendment of House legislation. The House joint resolution to which the Senate added Section 3013 was com-

prised in major part of appropriations for government agencies and departments. The question whether appropriations bills are within the scope of the Origination Clause is the subject of a venerable dispute between the House and the Senate. Rejecting the Senate's ability to add this kind of amendment to a House bill containing appropriations would both restrict the Senate's amendment power and repudiate the House's longstanding view that appropriations bills are "Bills for raising Revenue." If it is necessary to reach this aspect of Origination Clause analysis, the Court should avoid entanglement in the longstanding dispute between the House and Senate and hold that the Origination Clause will not invalidate a Senate amendment to a House bill that includes appropriations.

ARGUMENT

I. ENFORCEMENT OF THE ORIGINATION CLAUSE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986). The nonjusticiability of a political question turns on "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Coleman* v. *Miller*, 307 U.S. 433, 454-455 (1939).

We acknowledge that several considerations militate against a finding of nonjusticiability in this case. First, this Court has entertained Origination Clause challenges on

four occasions in the past,[6] and has discussed the meaning of the Clause on a fifth occasion.[7] Second, the text of the constitutional provisions—"All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills"—does not explicitly state that Congress or the Executive should resolve questions arising under the provision. Cf. *Gilligan* v. *Morgan*, 413 U.S. 1, 6 (1973) (holding that Art. I, § 8, Cl. 16 "is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard)"). Third, the general nature of the inquiry, which involves the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function.

Despite these considerations, we believe that an Origination Clause challenge presents a nonjusticiable political question. As an initial matter, the Court is in no sense precluded or constrained, by reason of the Origination Clause precedents, from finding nonjusticiability. Not only has the Court never invalidated a statute on Origination Clause grounds, but in three of the four cases adjudicating Origination Clause challenges the Court raised questions about the justiciability of at least some aspect of the claim.[8] Inasmuch as it has never explicitly considered

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[6] *Rainey* v. *United States*, 232 U.S. 310 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897).

[7] *United States* v. *Norton*, 91 U.S. (1 Otto) 566 (1875).

[8] See *Rainey* v. *United States*, 232 U.S. at 317 (Court's decision does not "intimat[e] that there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity" and assumes "for the sake of the argument that such power may be invoked"); *Flint* v. *Stone Tracy Co.*, 220 U.S. at 143 ("In thus deciding [that there is no

the applicability of the political question doctrine to the Origination Clause, the Court can appropriately conclude that Origination Clause challenges are nonjusticiable without the need to reconsider any of its prior decisions.

1. The most persuasive factor suggesting nonjusticiability is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). The Origination Clause accords the House of Representatives the responsibility to initiate "Bills for raising Revenue." The House is also vested, through the requirement of bicameralism (Art. I, § 7, Cl. 2), with absolute power to enforce its prerogative. That power is not merely theoretical. On repeated occasions over the past two centuries, the House has enforced its prerogative to originate "Bills for raising Revenue" by voting to return to the Senate various bills determined by the House not to be in compliance with that constitutionally ordained procedure.[9] The House has also em-

Origination Clause violation] we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department."); *Twin City Bank* v. *Nebeker*, 167 U.S. at 203 (Court's "interpretation of the statute renders it unnecessary to consider whether * * * the journals of the two Houses of Congress can be referred to for the purpose of determining" the origination of a statute).

[9] See, *e.g.*,132 Cong. Rec. 26,202 (1986); 131 Cong. Rec. 25,418 (1985); 129 Cong. Rec. 12,486 (1983); 125 Cong. Rec. 31,517-31,518 (1979); 117 Cong. Rec. 12,991 (1971); 111 Cong. Rec. 11,149-11,150 (1965); 108 Cong. Rec. 23,014-23,015 (1962); 106 Cong. Rec. 15,818-15,819 (1960); 81 Cong. Rec. 2,930 (1937); 69 Cong. Rec. 1,529-1,530 (1928); 66 Cong. Rec. 2,941-2,965 (1925); 39 Cong. Rec. 2,730-2,736 (1905); 7 Cong. Rec. 4,606-4,613 (1878); Cong. Globe, 41st Cong., 3d Sess. 791 (1871); Cong. Globe, 35th Cong., 2d Sess. 1,666-1,667 (1859).

bodied its view of its prerogative in its formal precedents and procedures.[10] The House clearly "has resources available to protect and assert its interests," *Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment), and it has repeatedly deployed those resources to enforce its role in originating revenue bills.

What is more, the House precedents treat the question of origination as one for members of the House to raise according to standards established over time through practice within the House. See, *e.g.*, 6 C. Cannon, *Cannon's Precedents of the House of Representatives* § 314, at 448 (1935) (Origination Clause objection untimely after bill had gone to conference); *id.* at § 315, at 448-449 (discussing standard applied by the House for determining when a bill is one "for raising Revenue"); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* § 1491, at 954 (1907) (discussing untimeliness of Origination Clause objection). In considering a particular piece of legislation, the House relies on its own interpretation of the Origination Clause to determine whether to exercise its authority to object, on Origination Clause grounds, to proposed legislation.

A contrary conclusion—that Origination Clause challenges are justiciable—puts individual litigants in the role of surrogate House Parliamentarians, second-guessing determinations made by the House itself and asserting the prerogative that the House declined to assert. That conclusion similarly propels courts entertaining those challenges

[10] See H.R. Doc. No. 279, 99th Cong., 2d Sess. 43-44 (1987) ("Constitution, Jefferson's Manual, and Rules of the House of Representatives"); 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives*, ch. 13, § 3 (1974); 6 C. Cannon, *Cannon's Precedents of the House of Representatives*, ch. 180 (1935); 2 A. Hinds, *Hinds' Precedents of the House of Representatives*, ch. 47 (1907).

into the odd—and unseemly—role of courts of parliamentary review. When it passes legislation, the House has thereby determined that its right of origination has not been violated, and that its procedures for enforcing the right need not be invoked. For the courts to instruct the House, after the fact, that it was wrong in concluding that its right of origination was not violated would surely express "lack of the respect due coordinate branches of government." *Baker* v. *Carr*, 369 U.S. at 217.

This is not a setting in which there is a compelling call for courts to exercise their traditional authority to construe provisions of the Constitution. In particular, it is not a case in which the rights of a citizen or a class of citizens are affected by the resolution of the constitutional question at issue. Compare *Powell* v. *McCormack*, 395 U.S. 486, 547-548 (1969). The Origination Clause affords no direct protection to individual citizens, and it does not ensure the citizenry as a whole that legislation will receive the consideration of both Houses of Congress and the President. Because the Origination Clause involves strictly a matter of sequence, a statute that has been passed in violation of the Origination Clause is not the product of any constitutional omission. Unlike a violation of the principles of bicameralism and presentment (cf. *INS* v. *Chadha*, 462 U.S. 919 (1983)), an Origination Clause violation does not deprive the citizenry of the participation of both Houses of Congress and of the President. Similarly, unlike a determination that congressional adjournment could shorten the President's time for reviewing legislation (cf. *The Pocket Veto Case*, 279 U.S. 655 (1929)), an Origination Clause violation does not deprive the citizenry of the President's opportunity for full deliberation.

From the outset, the Origination Clause has been a device that affected the relative powers of the two Houses of Congress, not a means by which the Constitution pro-

tects the citizenry from the government. The similar British rule—that money bills must originate in the House of Commons, with the House of Lords entitled only to approve or disapprove those bills—reflected the unrepresentative character of the House of Lords; but that concern was always of limited applicability to our government. See J. Story, *Commentaries on the Constitution* §§ 445, 446, at 315-317 (R. Rotunda & J. Nowak ed. 1987).[11] It is especially so now, with a Senate that is popularly elected. U.S. Const. Amend. XVII. As the court of appeals acknowledged, "diminished concern about the Senate's lack of accountability has largely undermined the clause's rationale." Pet. App. 4a.[12] Thus, respondent cannot seri-

[11] The Framers drew the Origination Clause from the British rule, but like most of the States prior to 1787, they deliberately departed from the British model by, among other things, permitting the Senate to amend House bills for raising revenue. See, *e.g.*, 1 M. Farrand, *The Records of the Federal Convention of 1787* (1966), at 233 (Madison); 2 M. Farrand, *supra*, at 278 (Dickenson); *id.* at 279 (Rutlidge); 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 376 (2d ed. 1836) (Madison).

[12] Some of the Framers believed that, even as a matter of sequence and internal allocation of responsibility, the origination privilege did not create a meaningful distinction between the House and Senate. See 1 M. Farrand , *supra*, at 535 (Yates) ("it is nothing more than a nominal privilege"); *id.* at 544 (Wilson) ("[i]f both branches were to say yes or no, it was of little consequence which should say yes or no first, which last"); *id.* at 545 (Pinckney) ("the privilege of originating money bills being of no account"). See also 2 M. Farrand, *supra*, at 297 (Williamson) ("some think this restriction on the Senate essential to liberty—others think it of no importance. Why should not the former be indulged"). To be sure, inclusion of the Clause was of considerable importance to delegates who viewed the House as more representative than the Senate (1 M. Farrand, *supra*, at 544) and to delegates from large States, which would have greater proportional representation in the House than in the Senate (2 M. Farrand, *supra*,

ously contend that the alleged Origination Clause violation has resulted in some injury to him—that the special assessment statute received less attention or was drafted differently because it originated in the Senate instead of the House. Respondent's only interest in the Origination Clause issue is that it provides him a vehicle through which to challenge his sentence. That should not be enough to permit courts to adjudicate Origination Clause claims, which we believe should be left—out of respect for a coordinate branch—to the two Houses of Congress whose interests the Origination Clause affects.[13]

2. Origination Clause challenges should be held nonjusticiable for an additional reason—the Origination Clause raises questions of definition and policy that are very difficult for courts to resolve. See *Baker* v. *Carr*, 369 U.S. at 217. To begin with, it is not easy to formulate judicially manageable standards to determine whether a

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at 514), but these doubts expressed by the Framers, like the text itself, support the conclusion that the Origination Clause should be viewed as no more than a matter of internal allocation between the House and the Senate. Similarly, although the authors of the Federalist papers emphasized the House's origination prerogative as an important attribute of its powers (The Federalist No. 58, at 394 (J. Cooke ed. 1961); *id.*, No. 66, at 498), they also expressed confidence in the House's ability to fend for itself in disputes with the Senate. See *id.*, No. 58, at 393 (House "will have no small advantage in a question depending on the comparative firmness of the two houses"); *id.*, No. 66, at 448 (noting that "the most *popular* branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch for every other member of the government").

[13] In a related context, this Court has recognized the nonjusticiability of certain challenges to the "requisite formalities" of legislation. *Baker* v. *Carr*, 369 U.S. at 214. See also *Leser* v. *Garnett*, 258 U.S. 130, 137 (1922); *Harwood* v. *Wentworth*, 162 U.S. 547, 560 (1896); *Field* v. *Clark*,, 143 U.S. 649, 672 (1892).

bill is "for raising Revenue." Thus, for example, the status of a statute that may have revenue implications only in certain years and under certain conditions is by no means free from doubt. The attempt to formulate standards for resolving such a question necessarily forces a court to make complicated fiscal and economic assumptions that may vary from year to year. That sort of effort would require "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice." *Coleman* v. *Miller*, 307 U.S. 433, 453 (1934).[14] Similarly, it will likely be difficult to formulate judicially manageable standards to determine where a bill "originated." Whether a bill "originates" when it is first introduced, when it is first passed by a house of Congress, or only when it is passed as the first step in the

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[14] The Origination Clause challenges to the Tax Equity and Fiscal Responsibility Act of 1982 are illustrative. Objectors claimed that the initial House version would have decreased revenue, while the Senate version actually increased revenue. Three circuits concluded that a bill that *relates* to revenue is within the reach of the Origination Clause, and that the Act therefore properly originated in the House even if the House version would have reduced revenue (*Armstrong* v. *United States*, 759 F. 2d 1378, 1380-1382 (9th Cir. 1985); *Wardell* v. *United States*, 757 F.2d 203, 205 (8th Cir. 1985); *Heitman* v. *United States*, 753 F. 2d 33, 35 (6th Cir. 1984)); one circuit refused to provide a judicial forum for Congressmen who had unsuccessfully objected to the statute on Origination Clause grounds in the House (*Moore* v. *House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *id.* at 956 (Scalia, J., concurring in the judgment)); and one circuit determined that the characterization of the House bill was a nonjusticiable political question (*Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163, 165-167 (5th Cir. 1985), cert. denied, 476 U.S. 1151 (1986)). Cf. *Bertelsen* v. *White*, 65 F.2d 719, 722 (1st Cir. 1933) (holding that Section 23 of Merchant Marine Act, 1920 (ch. 250, 41 Stat. 997) is not bill for raising revenue in part because it actually "diminishes the revenue of the government").

direct chain of enactments leading to the final statute are exceedingly fine questions of legislative practice and procedure. For purposes of determining origination, it is unclear whether an omnibus statute should be reviewed in its entirety as one bill, or, in contrast, whether each of its component parts should be analyzed separately to determine their origins.[15] In the ensuing effort to give content to the terms "raising Revenue" and "originate," courts would likely find manageable standards elusive and policy judgments inevitable.

3. To the extent that Origination Clause challenges are deemed justiciable at all, the judicial role in reviewing those challenges should be extremely limited. The same concerns that underlie the political question doctrine sometimes compel judicial deference even if a matter is not found to be a nonjusticiable political question. See *Fiallo* v. *Bell*, 430 U.S. 787, 796 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976). For that reason, even if occasions arise in which the Article III branch may properly strike down a statute on Origination Clause grounds, those occasions should, we believe, be limited to the clearest and most unambiguous cases. As we show below, this is surely not such a case.

II. SECTION 3013 DOES NOT VIOLATE THE ORIGINATION CLAUSE

A. Section 3013 is not a "Bill[ ] for raising Revenue" Within the Meaning of the Origination Clause

In order to be subject to the Origination Clause, a bill must be one "for raising Revenue." This Court has given that phrase a narrow interpretation, holding that the

[15] The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, which occupies more than seven hundred pages in the Statutes at Large (98 Stat. 494-1210), is an example of one such omnibus statute comprised of many independent provisions.

Origination Clause does not apply to legislation that imposes an exaction for a purpose other than raising general revenue.

In *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202-203 (1897), the Court held that bills for raising revenue "are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." See *Millard* v. *Roberts*, 202 U.S. 429, 436-437 (1906); *United States* v. *Norton*, 91 U.S. (1 Otto) 566, 569 (1875); 1 J. Story, *Commentaries on the Constitution* § 880, at 611 (2d ed. 1851).[16]

The Court's decisions in *Nebeker* and *Millard* demonstrate the narrow scope of the Origination Clause. In both cases, even an assessment labelled a "tax" by Congress was held not to be within the reach of the Origination Clause because in each case the bill was designed to serve other purposes, even though it incidentally generated revenue.

[16] This understanding of the narrow scope of the Origination Clause is supported by its carefully chosen language, which refers not to bills that raise revenue or to revenue-raising bills or to money bills, but to bills "for" raising revenue. This narrow reading is also supported by the debates on the Clause in the Constitutional Convention. See, *e.g.*, 2 M. Farrand, *supra*, at 263 (Randolph) ("He signified that he should propose instead of the original Section, a clause specifying that the bills in question should be for the purpose of Revenue, in order to repel y[illegible] objection agst. the extent of the words '*raising money*,' which might happen incidentally."); *id.* at 273 (Mason) ("This amendment removes all the objections urged agst. the section as it stood first. By specifying *purposes of revenue*, it obviated the objection that the Section extended to all bills under which money might incidentally arise."); *id.* at 276 (Madison) (noting that the term "revenue" is ambiguous, that many measures would have a revenue purpose as well as another, and that it would often be difficult to determine whether raising revenue was the primary one). Earlier drafts of the Origination Clause had referred to "money bills" (1 M. Farrand, *supra*, at 224) and "Bills for raising * * * money" (2 M. Farrand, *supra*, at 14).

In *Nebeker*, the Court rejected an Origination Clause challenge to a provision in the National Bank Act imposing a fee on notes in circulation. The Court concluded that the challenged section was not a "Bill[ ] for raising Revenue" within the meaning of the Origination Clause because it was designed to "meet the expenses attending the execution of the act" and to accomplish the goal of establishing the currency, rather than "to raise revenue to be applied in meeting the expenses or obligations of the Government." 167 U.S. at 202-203. Similarly, in *Millard*, the Court rejected an Origination Clause challenge to provisions levying taxes on property within the District of Columbia in order to finance certain railroad construction activities. Again, the Court determined that the challenged measures were not within the scope of the Origination Clause because "[w]hatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437.[17]

Under this standard, Section 3013 is not a "Bill[] for raising Revenue." It was enacted not to raise general revenue for the support of the government, but for two

[17] Other courts have likewise given the term "Bill[] for raising Revenue" a narrow meaning. See *South Carolina* v. *Block*, 717 F. 2d 874, 887 (4th Cir. 1983) (50-cent deduction imposed on proceeds of milk sales to defray cost of price-support program and to reduce overproduction is not a tax and is thus not within the requirements of the Origination Clause), cert. denied, 465 U.S. 1080 (1984); *Bertlesen* v. *White*, 65 F.2d 719, 722 (1st Cir. 1933) (Section 23 of the Merchant Marine Act of 1920 (ch. 250, 41 Stat. 997) is not a bill for raising revenue); *United States* v. *James*, 26 Fed. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15,464) (increase in postage rates is not a bill for raising revenue: "Certain legislative measures are unmistakably bills for raising revenue. * * * They draw money from the citizen; they give no direct equivalent in return.").

other purposes—to assist victims of crime and to penalize violators of federal law.[18]

1. As conceived by Congress, the principal function of Section 3013 was to furnish aid to victims of crime. Section 3013 was enacted as one part of an integrated program to provide federal assistance to such victims. Victims of Crime Act of 1984, Pub. L. No. 98-473, §§ 1401-1405, 98 Stat. 2170-2175. As we previously noted, the Victims of Crime Act of 1984 established a Crime Victims Fund; authorized grants from the Crime Victims Fund to victim compensation and assistance programs if they met enumerated criteria (42 U.S.C. 10601, 10602, 10603 (Supp. II 1984)); and directed that special assessments collected under the authority of Section 3013 (along with other specified moneys) be deposited into the Crime Victims Fund (42 U.S.C. 10601(b)(2) (Supp. II 1984)). A measure such as Section 3013 that imposes an assessment

[18] In contrast to the court of appeals here, other courts of appeals considering Origination Clause challenges to Section 3013 have concluded that it is not a "Bill[] for raising Revenue" within the Clause because it was enacted for purposes other than the generation of general revenue. The Third Circuit and the Fifth Circuit have determined that the primary purpose was to aid victims of crime (*United States* v. *Simpson*, 885 F.2d 36 (3d Cir. 1989)); *United States* v. *Herrada*, No. 89-2324 (5th Cir. Oct. 18, 1989)); the Second Circuit has determined that the primary purpose was to increase penalties on lawbreakers (*United States* v. *Griffin*, 884 F. 2d 655 (1989)); and the Sixth Circuit has determined that the primary purpose was both to aid victims and punish law-breakers (*United States* v. *Ashburn*, 884 F.2d 901 (1989)). In contexts outside the Origination Clause, courts of appeals have similarly concluded that the primary purpose of Section 3013 is either to assist victims (*United States* v. *Dobbins*, 807 F. 2d 130, 131 (8th Cir. 1986); *United States* v. *Donaldson*, 797 F. 2d 125, 127 (3d Cir. 1986)) or to punish criminals (*United States* v. *Davis*, 845 F.2d 94, 97 n.2 (5th Cir. 1988); *United States* v. *King*, 824 F.2d 313, 316-317 (4th Cir. 1987); *United States* v. *Mayberry*, 774 F.2d 1018, 1021 (10th Cir. 1985)).

to support a particular governmental program is not a bill for raising revenue, especially since the program that it funds is a remedial one designed to address problems caused by the conduct of the very class of persons on whom the assessment is imposed.

For its part, the court of appeals characterized Section 3013 as a bill for raising revenue because it concluded that Section 3013 assessments imposed under authority of that provision would constitute general income to the Treasury. Pet. App. 8a-9a. That is not so. Although the court below relied principally on the Senate Judiciary Committee's statement that the assessments "will constitute new income for the Federal government," S. Rep. No. 497, 98th Cong., 2d Sess. 14 (1984), that statement lends no support to the court's conclusion. The Committee's observation would equally fit any bill that brought in money to fund a particular government program, such as the currency program in *Nebeker* or the railroad construction program in *Millard*; the statement neither means nor implies that assessments would be available for general governmental expenditures.[19]

What is more, the court of appeals wholly ignored Congress's command, set forth in the same statute containing the assessment provision, that assessments are *not* to be placed in the general fund of the Treasury but are to be deposited in the separate Crime Victims Fund. 42 U.S.C.

[19] The court of appeals also failed to address the significance of the fact that the statement in the Senate Report on which it placed so much weight appears immediately after an explicit statement that "[t]he purpose of imposing nominal assessment fees is to generate needed income to offset the cost" of the victims' assistance fund. S. Rep. No. 497, *supra*, at 13. Thus, in context, the statement clearly means that the assessments would produce "new income" that would be used to support the new victims' assistance program.

10601 (Supp. II 1984).[20] In fact, moneys from that Fund were to be transferred to the general Treasury only if the amount in the Fund reached $100 million (42 U.S.C. 10601(c)(1) (Supp. II 1984)).[21] Even if excess amounts are eventually transferred, the character of the assessment provision itself does not change. Nothing in *Millard* or *Nebeker* (or the statutes involved in those cases) indicates that money raised under the programs at issue would under no circumstances be used as general revenue. Hence, the assessment provision is properly viewed as outside the reach of the Origination Clause because it was designed to finance victim assistance programs rather than to raise general revenue.

2. Section 3013 should have been upheld for the further reason that the assessments, like fines and forfeitures, are penal and therefore are not "for raising Revenue." Assessments are imposed only on convicted criminals.

[20] In view of this requirement, the court of appeals' statement that "Congress failed to restrict the use of the monies assessed under section 3013 in any way" (Pet. App. 9a) is clearly wrong.

[21] The $100 million cap has since been raised. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7121(a), 102 Stat. 4419; Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, § 102(b)(1), 100 Stat. 904. The current ceiling is $125 million through fiscal year 1991 and $150 million for fiscal years 1992 through 1994. § 7121(a), 102 Stat. 4419. According to Justice Department records, the applicable ceiling has been exceeded only once, in fiscal year 1989, when the ceiling was $125 million and deposits into the Fund from all sources totalled between $133 million and $134 million; by statute (Pub. L. No. 100-690, § 7121(a)), the first $2.2 million of any excess is allocated to the judicial branch for certain administrative costs. Deposits into the Crime Victims Fund are from many sources (42 U.S.C. 10601(b) (Supp. II 1984)), and the special assessments under Section 3013 are typically a small percentage of the total deposits. See U.S. Dep't of Justice, Office for Victims of Crime, Office of Justice Programs, *Victims of Crime Act of 1984; A Report to Congress by the Attorney General*, 9-12 (1988).

Assessments vary according to the seriousness of the offense and are imposed as part of each defendant's sentence. Section 3013(b) directs that assessments are to "be collected in the manner that fines are collected in criminal cases." The provision directing that assessments be deposited in the Crime Victims Fund refers to them as "penalty assessments." 42 U.S.C. 10601(b)(2) (Supp. II 1984). And the provision that added Section 3013 to the Criminal Code did so in a provision, Section 1405(a), that was itself labeled "penalty assessment." 98 Stat. 2174.[22] See also *Ray* v. *United States*, 481 U.S. 736 (1987) (concurrent sentence doctrine could not be applied where separate assessments, pursuant to Section 3013, had been imposed on each conviction). Accordingly, in light of its penal purpose, Section 3013 is no more a bill "for raising Revenue" than is a statute imposing criminal fines on convicted defendants.

B. Section 3013 Originated in the House of Representatives

Even if Section 3013 is somehow viewed as a bill for raising revenue, the court of appeals was nonetheless wrong in concluding that the bill that became Section 3013

[22] The Senate's use of "penalty assessments" in a similar but not identical bill (S. 2423, 98th Cong., 2d Sess. (1984); see n.23, *infra*) lends additional support to this view of the statute's purpose. Contrary to the court of appeals' suggestion (Pet. App. 10a-11a), there is no indication that Congress altered its understanding of the purpose of the assessment provision when it used the term "special assessments" in the final version of Section 3013 rather than "penalty assessments," particularly because "penalty assessments" remains as a description of Section 3013 elsewhere in the Victims of Crime Act of 1984 (§ 1402(b)). See also 130 Cong. Rec. H12,084 (daily ed. Oct. 10, 1984) (section-by-section analysis of H.R.J. Res. 648 conference bill) (referring to "penalty assessments collected under 18 U.S.C. 3013"); *id.* at H12,086 (explaining that section 3013 "imposes a financial penalty upon persons convicted of an offense against the United States").

originated in the Senate. The court's conclusion rests on a mistaken reading of the legislative history and on an insufficient appreciation of the "practical construction" (*Nebeker*, 167 U.S. at 202) that is to be given, and has been given by Congress itself, to the Origination Clause.

It is true, as the court of appeals stated (Pet. App. 13a), that the Senate was the first of the two houses to pass an assessment provision. But it was a House version of the assessment provision that was ultimately enacted into law. For that reason, the bill that became Section 3013 is properly viewed as having originated in the House.

In May 1984, Senator Heinz proposed to amend S. 2423, a bill entitled the Victims of Crimes Assistance Act of 1984, by adding a provision allowing for the collection of "penalty assessments." *The Victims of Crime Assistance Act of 1984: Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 21 (1984). A penalty assessment provision was included as Section 201 of that bill when it was reported by the Senate Judiciary Committee, see S. Rep. No. 497, 98th Cong., 2d Sess. 4, 13 (1984), and the bill containing the penalty assessment provision passed the Senate on August 10, 1984. 130 Cong. Rec. 23,803-23,805. That penalty assessment provision, which was never passed by the House, was different in wording and structure from the bill that ultimately became Section 3013.[23]

[23] Section 201 of S. 2423 stated (130 Cong. Rec. 23,805 (1984)(emphasis omitted)):

PENALTY ASSESSMENT FEES

Sec. 201. Whenever any person is convicted of an offense in any court of the United States, the court shall impose a penalty assessment fee on such person in the amount of –

(a) $25, if the defendant is an individual and the offense is a misdemeanor;

(b) $50, if the defendant is an individual and the offense is a

On September 25, 1984, the House passed H.R.J. Res. 648, the House version of the continuing appropriations resolution for fiscal year 1985. 130 Cong. Rec. 26,837-26,838. The House bill did not at that time contain any assessment provision. See 130 Cong. Rec. H11,970 (daily ed. Oct. 10, 1984) (joint explanatory statement of conference committee). In a separate action on October 2, 1984, the House passed H.R. 5690, 98th Cong., 2d Sess. (1984), a bill entitled the Anti-Crime Act of 1984. Section 1005 of that bill was a penalty assessment provision identical to Section 3013 as it was ultimately enacted. 130 Cong. Rec. 28,574, 28,648. Two days later when the continuing appropriations resolution was before the Senate, the Senate added a penalty assessment provision to that bill as Section 1405 of H.R.J. Res. 648. That provision, however, was not the provision that the Senate had passed in August, but was identical to the penalty assessment provision that the House had passed two days earlier, on October 2, 1984. The continuing appropriations resolution, with the penalty provision included, was passed by the Senate on October 4 and signed into law as Public Law No. 98-473 on October 12, 1984.

From this sequence of events, it is clear that the House of Representatives was the first House to pass the assessment provision that was actually signed into law. What the Senate did on October 4, 1984, was simply to combine two separate House bills into the Senate's version of H.R.J. Res. 648, without making any changes in the House version of the penalty assessment provision. The court of appeals failed to advert to the penalty assessment provision that passed the House on October 2, and for that reason

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felony;

(c) $100, if the defendant is a person other than an individual and the offense is a misdemeanor; and

(d) $200, if the defendant is a person other than an individual and the offense is a felony.

erroneously concluded that the bill that became Section 3013 originated in the Senate.

Where, as here, the House is the first chamber to pass the precise measure in question, the measure should be found to have originated in the House, even though a similar measure had earlier been passed by the Senate. That conclusion also follows *a fortiori* from the well-established prerogative of the House, upon being presented with a Senate-originated bill for raising revenue, to insert the Senate's language into a House bill, pass the new bill, and send it to the Senate.[24] Since the House is at liberty to do that, it may also, upon being presented with a Senate-originated revenue bill, insert a modified version of that bill into a new House bill. And in that setting, the provision in question still must be said to have "originated" in the House even if, as in this case, the Senate combines that bill and another House bill into a single piece of legislation and passes it in that form.

The House bill, H.R. 5690, was not simply a modified version of the earlier Senate-passed measure, S. 2423. It was, rather, an accommodation of S. 2423 and several other measures, including another proposed House bill, H.R. 3498, 98th Cong., 1st Sess. (1983).[25] Congressman

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[24] See generally 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives* §§ 13-18, at 292-314 (1974) (H.R. Doc. No. 661, 94th Cong., 2d Sess. (1974)); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 1484, 1485, 1495, at 943-945, 967-969 (1907). Without that prerogative, the House could be entirely precluded by the Senate from adopting a given revenue measure if the Senate simply passed it first. That would not only be practically intolerable but would turn the Origination Clause's protection of a House prerogative on its head.

[25] In light of the court of appeals' statement that "[t]he special assessment provision was introduced in the Senate Judiciary Committee" in May 1984 (Pet. App. 13a-14a), it is worth noting that Congressman Rodino introduced H.R. 3498 on June 30, 1983, and that

Rodino explained the origins of the Senate amendments to H.R.J. Res. 648 and hence of the conference bill (130 Cong. Rec. H12,084 (daily ed. Oct. 10, 1984)):

> The other body early last August passed a modified version of the administration bill, and shortly after that I began negotiations with the administration and the leadership of the other body's Judiciary Committee. Those negotiations successfully resolved the differences among the three bills—H.R. 3498, the administration bill, and the bill passed by the other body. I introduced the compromise that we worked out—H.R. 6403—which was also included in the crime package amendments to H.R. 5690 that were approved by the House on Tuesday, October 2. The other body attached the compromise to the continuing resolution, and the House's conferees agreed to accept the language.

In short, the provision that enacted Section 3013 into law originated in the House for purposes of the Origination Clause.

C. The Senate's Action was a Permissible Amendment of a House Bill

The Origination Clause provides not only that "[a]ll Bills for raising Revenue shall originate in the House of Representatives," but also that "the Senate may propose or concur with Amendments as on other Bills." Thus, the Senate's legislative action will not violate the Origination Clause if the Senate action is an amendment to a bill for

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H.R. 3498 is far closer to the enacted bill in language and structure than is S. 2423. See U.S. Dep't of Justice, Office of Justice Programs, *Indexed Legislative History of the Victims of Crime Act of 1984*, at 176 (1985).

raising revenue that originated in the House. In two Origination Clause cases, this Court concluded that the Senate action was a permissible amendment of a revenue bill that originated in the House. In the first case, *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), the Court considered an Origination Clause challenge to a tax statute on the ground that the Senate had substituted a corporate tax for the inheritance tax that had passed the House. The Court rejected the challenge because the "amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose." 220 U.S. at 143. In the second case, *Rainey* v. *United States*, 232 U.S. 310 (1914), the Court similarly rejected a challenge to Section 37 of the Tariff Act of 1909, which was added by the Senate, because "the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House." 232 U.S. at 317.

The court of appeals rejected the contention that Section 3013 could be sustained as a Senate amendment because " 'the subject matter of the House bill in this case was crime control—not raising revenue' " (Pet. App. 14a) (quoting the district court's opinion). This statement reflects a misreading of H.R.J. Res. 648. H.R.J. Res. 648, as it passed the House, provided continuing appropriations for various government agencies, as well as a version of the Comprehensive Crime Control Act of 1984, which had been adopted immediately prior to passage of the continuing resolution. See 130 Cong. Rec. 26,780-26,836 (1984). The Senate then added many amendments, including the Victims of Crime Act of 1984 (and the provision establishing Section 3013). 130 Cong. Rec. S13,520-S13,544 (daily ed. Oct. 4, 1984). The court of appeals' conclusion that H.R.J. Res. 648 related only to crime control thus ignored the fact that it was also a continuing appropriations resolution.

The question whether appropriations bills are "Bills for raising Revenue" within the meaning of the Origination Clause has been the subject of vigorous dispute between the House and the Senate. See generally 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives* § 20, at 331-340 (1974). The House has insisted that appropriations bills are within the scope of the Origination Clause.[26] The Senate has equally insisted that such bills are not within the scope of the Origination Clause;[27] it has acceded to the practice of House origination of appropriations bills, but has emphasized that the practice is not required by the Origination Clause.[28]

We do not ask the Court to endorse either view; rather, we suggest that the Court not allow an Origination Clause challenge to invalidate a provision contained in a Senate amendment to a House appropriations bill. To hold, as a matter of constitutional mandate, that the Senate may not amend an appropriations bill with a revenue-related amendment would both deprive the Senate of amendment power and repudiate the House's settled view of its powers

[26] See, *e.g.*, 108 Cong. Rec. 23,014 (1962) (Rep. Cannon) (Senate's "joint resolution is an infringement on the privileges of the House, as stated in section 7 of article I of the Constitution, under which the House of Representatives has always maintained the right to originate the appropriations bills. The priority of the House in the initiation of appropriation bills is buttressed by the strongest and most compelling of all rules, the rule of immemorial usage").

[27] See, *e.g.*, S. Doc. No. 17, 88th Cong., 1st Sess. (1963) ("The Authority of the Senate to Originate Appropriation Bills").

[28] See S. Doc. No. 17, *supra*, at 1 ("[F]or the most part, the Senate has acquiesced in the position of the House and, as a matter of practice and procedure, all appropriation measures do originate in the House of Representatives. This, however, is a matter of practice and not of constitutional right").

regarding appropriations bills.[29] To the extent that Origination Clause challenges to congressional determinations of sequence and priority are justiciable at all, the standards for evaluating those challenges surely do not require such a disruptive intrusion into congressional practices.

Sustaining the court of appeals' conclusion that the Senate amendment violated the Origination Clause would require this Court to hold either that the appropriations feature of H.R.J. Res. 648 was of no moment, or that the Senate may not add a revenue-related amendment to a House appropriations bill. In order to avoid entanglement in the venerable dispute between the House and the Senate over the origination of appropriations bills, the Court should reject both alternatives and hold that the Senate amendment to a House bill that contained appropriations provisions will not be invalidated as an impermissible exercise of the Senate's amendment powers under the Origination Clause.

[29] There may, of course, be internal congressional constraints on the extent to which the Senate can add revenue-related amendments to House appropriations bills. See, *e.g.*, H.R. Doc. No. 279, *Supra*, at 570-574 (Rules of the House of Representatives, Rule XX, cl. 2; Rule XXI, cl. 2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether enforcement of the Origination Clause of the Constitution, Art. I, § 7, cl. 1 presents a nonjusticiable political question?

2. Whether 18 U.S.C. § 3013, which directs the federal courts to impose special assessments on defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, cl. 1?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 7, cl. 1 of the United States Constitution requires:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Title 18, United States Code, § 3013, as enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, ch. XIV, § 1405, 98 Stat. 2174-2175, provided:

> § 3013. Special assessment on convicted persons
>
> (a) The court shall assess on any person convicted of an offense against the United States—
>
> (1) in the case of a misdemeanor—
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony—
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.[1]

[1] 18 U.S.C. § 3013 was amended by Pub. L. No. 100-185, § 3, Dec. 11, 1987, 101 Stat. 1279, and by Pub. L. No. 100-690, Title VII, §§ 7082(b), 7085, Nov. 18, 1988, 102 Stat. 4407, 4408.

The December 1987 amendments added subsections (c) and (d) providing that the obligation to pay an assessment ceases five years after the date of the judgment and that an offense under section 13 of

SUMMARY OF ARGUMENT

1. The Court of Appeals correctly decided that the Origination Clause is subject to judicial review and does not present a nonjusticiable "political question." An analysis of the factors set forth in *Baker* v. *Carr*, 369 U.S. 186 (1962), compels the conclusion that judicial interpretation of the Origination Clause is not precluded by the political question doctrine. Nothing in the text of the Constitution commits to Congress the sole authority to decide whether an act violates the Origination Clause. Congress has relied on judicial interpretations in deciding whether a bill violates the Origination Clause. Interpreting the Origination Clause does not require the Court to make policy determinations. The ability of the House to protect and assert its prerogative under the Origination Clause cannot preclude the Court from performing its historical function of interpreting the Constitution. The Origination Clause is not simply a rule of parliamentary procedure or

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Title 18, United States Code (the Assimilative Crimes Act) is an offense against the United States. The five year limitation provided in subsection (c) is shorter than the twenty year statute of limitations applicable to fines. See 18 U.S.C. § 3565(h) (1985), repealed and replaced by 18 U.S.C. § 3613(b) (1987). The provision regarding applicability to Assimilative Crimes under 18 U.S.C. § 13 was added in order to overturn court decisions that had held the assessment not applicable to such convictions. H.R. Rep. No. 100-390, at 4.

The November 1988 amendments changed the amounts of the assessments applicable to various levels of cases and specified that the five year statute of limitations applies to all assessments regardless of the date of imposition. Pub. L. No. 100-690, § 7085, 102 Stat. 4408.

Neither the December 1987 nor November 1988 amendments altered the directive in section 3013(a) that the court *shall* assess the applicable amount on any person convicted of an offense against the United States.

only a "matter of sequence"; it is a constitutional rule of accountability for revenue legislation as well as a balance of the power between the House and Senate. The Clause provides direct protection to individual citizens by insuring that the representatives most directly responsive to the people take the responsibility of taking money from the people through taxation. Judicial interpretation of the Origination Clause presents no more danger of "multifarious pronouncements" than in any instance where a court reviews a law.

2. Section 3013 violates the Origination Clause.

a. The purpose of section 3013 is to raise revenue for the general obligations of government. Even if the purpose of section 3013 is a more limited or "special" purpose, it is not exempt from the Origination Clause. The funds are not designed to benefit the class of individuals levied against and are not used to offset costs of a service that benefits those individuals who pay the charge. *See Millard* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Nat'l Bank* v. *Nebecker*, 167 U.S. 196 (1897); *United States* v. *Norton*, 91 U.S. 566 (1875). Finally, section 3013 is not a penalty provision. It is not located in any sentencing provision of Title 18, nor is it a viable sentencing option for federal judges. The statute does not refer to penalty assessments, but rather, to *special* assessments.

b. Section 3013 originated in the Senate. The Senate was the first body to place the special assessment provision into the legislation that was ultimately enacted. On September 25, 1984, the House passed H.R.J. Res. 648, without a special assessment provision. On October 4, 1984, the Senate amended H.R.J. Res. 648, adding the special assessment provision. The fact that the provision the Senate inserted into H.R.J. Res. 648 was identical to

H.R. 5690, a bill the House passed but never became law, is not determinative of where the provision originated. The bright line test of which body placed the measure into the legislation that was ultimately enacted is the only practical and reasonable test for origination.

3. The Senate's addition of section 3013 to H.R.J. Res. 648 was not a permissible amendment. The Senate may only make revenue raising amendments to "revenue raising bills." Because H.R.J. Res. 648 was not a "revenue raising bill", the Senate's action in amending it with a revenue raising provision violated the Constitution. To hold that the Origination Clause will not invalidate a Senate amendment to a House bill that includes appropriations is to equate appropriations bills with revenue raising bills, an issue that need not be addressed by this case.

ARGUMENT

I. ENFORCEMENT OF THE ORIGINATION CLAUSE DOES NOT IMPLICATE THE "POLITICAL QUESTION DOCTRINE."

The Court of Appeals correctly held that the Origination Clause is subject to judicial review and enforcement; it does not present a nonjusticiable political question. A "political question" arises only when one of the following circumstances is present:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. *Carr*, 369 U.S. 186, 217 (1962).

Unless one of these circumstances is "inextricable from the case at bar," the issue is justiciable and not within the political question doctrine. *Id.* at 217. The principle of separation of powers which demands that the judiciary refrain from resolving issues that are "political", *e.g.*, *O'Donoghue* v. *United States*, 289 U.S. 516, 503 (1933),[2] must be balanced against the Judiciary's responsibility to interpret the Constitution, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). However, "[n]o policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." *INS* v. *Chadha*, 462 U.S. 919, 941-42 (1983).

Petitioner acknowledges that several considerations "militate against a finding of nonjusticiability" in this case, i.e. (1) the Court has entertained Origination Clause challenges in the past; (2) nothing in the text of the Clause explicitly provides for resolution of Origination Clause issues by only the Congress or Executive; and (3) the general nature of the inquiry is one that is familiar to the courts and often central to the judicial function. [Pet. Br.

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[2] The Court stated: "The Constitution, in distributing the powers of government, creates three distinct and separate departments . . . . This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . . namely, to preclude a commingling of these essentially different powers of government in the same hands." 289 U.S. at 530.

8-9]. Despite this, Petitioner asserts that an Origination Clause challenge presents a nonjusticiable political question.[3] Contrary to Petitioner's assertion, none of the *Baker* criteria are satisfied in this case.

1. There is no "textually demonstrable constitutional commitment" of the interpretation of the Origination Clause to the legislative branch. Whether there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and the scope of any such commitment is the threshold question to be addressed. *Powell* v. *McCormack*, 395 U.S. 486, 521 (1969). Such analysis is itself a "delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Id.* (quoting from *Baker* v. *Carr*, 369 U.S. at 211).

Nothing in the text of the Constitution commits to Congress the sole authority to decide whether an act violates the Origination Clause. Indeed, Petitioner concedes that the text of the provision does not explicitly state that Congress or the Executive should resolve questions of interpretation. [Pet. Br. 9]. In addition, this Court has previously considered Origination Clause issues on four occasions in the past and has discussed its meaning on a fifth occasion.[4] In fact, several federal courts of

[3] Petitioner first raised the issue of nonjusticiability in its petition for rehearing with suggestion for rehearing *en banc*, filed after the Court of Appeals rendered its decision in *Munoz*. The government also did not assert nonjusticiability as a defense to the Origination Clause argument presented by Sperry Corporation in a case before this Court. *United States* v. *Sperry*, No. 88-952 (U.S. S. Ct. Nov. 28, 1989) (see Brief of the United States at 48-49).

[4] See Pet. Br. at 8, citing *Rainey* v. *United States*, 232 U.S. 310 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Nat'l Bank* v. *Nebecker*, 167 U.S. 196 (1897); and *United States* v. *Norton*, 91 U.S. (1 Otto) 566 (1875).

appeals to consider the issue have found the Origination Clause justiciable.[5] The states that have similar clauses in their own constitutions have generally found the clause justiciable.[6]

The House itself has relied on judicial interpretation in debating whether particular legislation is a violation of the Origination Clause. Members of the House have recognized the role of the courts in interpreting the Clause, a recognition that has contributed to the House strictly adhering to the constitutional mandate. *See, e.g.*, 2 A. Hinds, *Hinds' Precedents of the House of Representatives* § 1494, at 964-67 (1907) [hereinafter 2 Hinds] (discussion of Justice Story's definition of "revenue" and Supreme Court interpretation of the term in *United States* v. *Norton* and *Twin City Nat'l Bank* v. *Nebecker;* 131 Cong. Rec. H9478-03 (1985) (consideration of Deficit Reduction Amendments of 1985 and recognition that treatment of certain provisions was consistent with Supreme Court

[5] *See, e.g.*, *United States* v. *Newman*, 889 F.2d 88 (6th Cir. 1989) (specifically holding Origination Clause justiciable); *United States* v. *Simpson*, 885 F.2d 36 (3d Cir. 1989) (same); *Armstrong* v. *United States*, 759 F.2d 1378 (9th Cir. 1985) (same): *Wardell* v. *United States*, 767 F.2d 203 (8th Cir. 1985) (per curiam) (adjudicating TEFRA claim on the merits); *Heitman* v. *United States*, 753 F.2d 33 (6th Cir. 1984) (per curiam) (same); *Moore* v. *House of Representatives*, 733 F.2d 936, 961 n.6 (D.C. Cir. 1984) (Scalia, J., concurring) (a private party injured by the legislation can litigate issue). *But see Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163 (5th Cir. 1985) (Origination Clause nonjusticiable).

[6] The vast majority of states with Origination Clauses in their constitutions have not expressed any reservations about the justiciabilitiy of violations. *See* J.M. Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L.J. 190-224 (1987) [hereinafter Medina].

decisions); 66 Cong. Rec. 2,941-2,965 (1925).[7]

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[7] There was a lengthy debate in 1925 in the House of Representatives over a Senate bill establishing rates of postage. Mr. Ramseyer "realize[d] that the House can arbitrarily place its own interpretation upon [the Origination Clause]. It can send this bill back for any reason or for no reason, and the Senate has no appeal from the action of the House. The real issue before us is, would the bill S. 3674, which the pending resolution undertakes to return to the Senate, if enacted into law, be unconstitutional because it originated in the Senate?" 66 Cong. Rec. at 2944. Mr. Garrett of Tennessee recognized the "question has to be decided somewhere, somehow. It can be decided here or it can be decided finally and officially in the Supreme Court of the United States." *Id.* at 2949. Mr. Connally of Texas argued "[i]t is our duty to meet this bill at the threshold. The courts can only decide at some indefinite time in the future." *Id.* at 2950. Mr. Crisp predicted "the mail-order houses, like Sears, Roebuck & Co. and other concerns, whose postage is increased, [will] test the constitutionality of the law in the Supreme Court of the United States, and in my judgment whenever that great court decides the legal question the court will declare it unconstitutional . . . . Should we pass it, the law will be void and of no legal effect, for it will be unconstitutional. For these reasons I shall vote to return it to the Senate." *Id.* at 2951. Mr. Kelly acknowledged "[t]he Supreme Court is going to have this bill, if it should be passed as a Senate measure, and decide whether it is a revenue bill or not. That means a date long distant from to-day." *Id.* at 2956. Mr. Madden: "We ought not to take any chances on some court later on deciding a salary bill with a revenue bill attached to it to be unconstitutional . . . the best way to get those salaries increased is to sustain this committee and to send the bill back to the Senate . . .]." *Id.* Mr. Black of Texas advised "[e]ach Member must decide it for himself in the light of the precedents of the House and the decisions of the Supreme Court of the United States . . . . Under our system of government the courts are the final arbiters upon questions of constitutional law, and to their construction Congress, as well as everybody else, should conform." *Id.* Mr. Stengle asked "why, [], should we insist on passing this measure as it now appears before us, when we can send it back to the Senate and then do the thing right, removing all doubt and finally passing a bill which can stand the test in any court." *Id.* at 2964. Mr. Longworth repeated "[t]his bill is of at least doubtful constitutionality. It will have to be tested by the Supreme Court of the United States, and if the Supreme Court should hold that it is unconstitutional your whole bill falls by the wayside and you hurt infinitely the chances of passing a similar bill raising postal salaries in the future." *Id.* at 2964. The resolution to return bill to the Senate was passed. *Id.*

2. There are judicially discoverable and manageable standards for interpreting the Origination Clause which do not involve policy determinations of a kind clearly for nonjudicial discretion. Petitioner argues it is not easy to formulate judicially manageable standards to determine whether a bill is "for raising Revenue" and that litigation will force a court to make complicated fiscal and economic assumptions that may vary from year to year. [Pet. Br. 14-15].[8] Petitioner also asserts that it will be "difficult" for courts to determine where a bill "originated" and whether an omnibus bill should have its component parts analyzed separately to determine their origins. [Pet. Br. 15-16].

Interpreting the meaning of words, e.g., revenue and originate, is the business of the courts. Determining whether statutory provisions violate the Constitution is a judicial function, regardless of the level of difficulty. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court is repeatedly called upon to make difficult decisions even in the face of "political consequences." *E.g. Baker* v. *Carr* (state apportionment statute); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (state legislative redistricting plan). The

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[8] Petitioner attempts to illustrate the point by reference to the Origination Clause challenges to the Tax Equity and Fiscal Responsibility Act (TEFRA). [Pet. Br. note 14] However, the TEFRA cases reflect the ease with which the courts dealt with the issue. The circuits uniformly agreed that "Bills for raising revenue" referred in general to all laws relating to taxes. *See Armstrong* v. *United States*, 759 F.2d at 1381; *Wardell* v. *United States*, 757 F.2d at 205; *Heitman* v. *United States*, 753 F.2d at 35.

House has been able to develop standards for determining whether a bill "raises revenue," where a bill "originates" and what is a "bill." *See, e.g.*, 2 Hinds, *supra* p. 8, §§ 1480-1500; 6 C. Cannon, *Cannon's Precedents of the House of Representatives* §§ 314-322 (1935) [hereinafter 6 Cannon]. Indeed, the House has taken significant guidance from the courts, guidance that has helped encourage compliance with the Constitution and should help alleviate intracongressional tensions. *See, e.g.*, note 7, *supra*.

Contrary to Petitioner's assertions, cases that turn on constitutional interpretation generally do not involve judicially unmanageable standards. *Powell* v. *McCormack*, 395 U.S. 486, 549 (1968). Not only has this Court already addressed several Origination Clause disputes, other state and federal courts have rendered decisions on the issue.[9] In addition the Court can examine the records of the Constitutional Convention in determining how to apply the Clause. *Powell* v. *McCormack*, 395 U.S. at 521-47.

Petitioner also speculates, without example, that the Origination Clause raises questions of definition and policy difficult for courts to resolve. [Pet. Br. 14]. No policy determinations need be made because determining the definition of the words in the Origination Clause presents purely legal questions. The "policy" determinations were made by the Framers who declared that "Bills for raising revenue must originate in the House of Representatives . . . ." Contrary to Petitioner's argument, the Court of Appeals correctly noted that the analysis of an Origination Clause issue is straightforward and tracks the language of the Clause. [Pet. App. 6a]. The Court must decide whether a Bill for raising revenue originated in the

[9] *See supra* notes 4 through 6.

House or whether the Senate bill amended a House revenue bill. This Court has certainly not avoided interpreting complicated tax laws or even complex treaties, e.g., *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 (1986).

3. Undertaking independent resolution of this issue would not express a lack of respect due coordinate branches of government. Nothing in the Clause itself provides for exclusive guardianship by the House. The House has not assumed that it is the final arbiter of the Origination Clause. *See supra* p. 7. The "threat" of litigation has in fact caused the House to seriously consider whether certain legislation violates the Clause. *See supra* note 7. Although the House has developed procedures to guard its constitutional responsibility to originate revenue bills, the House has also looked to court decisions for guidance in determining whether to return bills to the Senate. Certainly members of the Congress must make independent and individual judgments regarding the constitutionality of legislation. *United States* v. *Nixon*, 418 U.S. 683, 703 (1974). These representatives take the same oath to support and defend the Constitution as do the judges.[10] U.S. Const. Art. VI, cl. 3. However, this consti-

[10] The Senate has also considered the constitutional requirement of the Origination Clause in its discussion of legislation. *See, e.g.*, 6 Cannon, *supra* p. 11, ch. 180, §§ 320, 321 (Senate declined to consider a bill challenged as an infringement on the right of the House to originate revenue measures); 2 Hinds, *supra* p. 8, ch. 47, §§ 1483, 1497 (bill to abolish a duty was refused consideration in the Senate, one objection being that the Senate had no right to originate such a measure; instances where the Senate has acquiesced in the constitutional requirement as to revenue bills, while holding to a broad power of amendment).

tutional obligation does not insulate actions of Congress from judicial review.

The fact that the House has resources to protect and assert its interests is irrelevant to the constitutional obligation of the Court to interpret the Constitution. The Court must interpret and enforce the Constitution even if both of the other branches appear to give up certain constitutional obligations or powers. For example, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), a portion of the Federal Election Campaign Act of 1971 was found to be a violation of the Presidential power to appoint all "Officers of the United States," Art. II, § 2, cl. 2 even though the bill passed both houses of congress and was signed by the President. Thus, the Court struck as an unconstitutional infringement on powers of the Executive branch, a law that the President signed. This was not viewed as a lack of respect for a coordinate branch of government. Likewise, in *INS* v. *Chadha*, the congressional veto provision of section 244(c)(2) of the Immigration and Nationality Act was found to violate the Presentment Clauses, Art. I, § 7, cl. 2, 3 and a violation of the doctrine of separation of powers. In so holding, the Court protected constitutional responsibilities of both the legislative and executive branches that had been given up by both.[11]

This case turns on nothing more than an interpretation of the Constitution and a statute enacted by the Congress.

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[11] *See also, e.g.*, Medina, *supra* note 6, at 202-03, 210 n.281, citing *H.A. Thierman Co.* v. *Commonwealth*, 123 Ky. 740 (1906) (court not bound by fact that the House, in passing the Senate bill, did not view the bill as an infringement on its prerogative to originate revenue bills); *Niemic* v. *King*, 109 N.H. 586 (1969) (opinion expressed by the court did not "detract from the power of the house to settle the rules of proceedings in their own house").

"Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.'" *Powell* v. *McCormack*, 395 U.S. at 547 (citation omitted). Resolution of litigation challenging the constitutional authority of the House cannot be evaded by this Court because of political implications. *INS* v. *Chadha*, 462 U.S. at 919.

Contrary to Petitioner's assertion, the Origination Clause is not simply a rule of parliamentary procedure or "strictly a matter of sequence." [Pet. Br. 11-12]. It is a constitutional rule of accountability for revenue legislation as well as a balance of the power between the House and Senate. If the Origination Clause were designed to be a mere procedural rule it would not have been necessary to insert it into the Constitution. At the time of the Constitutional Convention, the origination of money bills in the popular House was the common practice. D. Watson, *The Constitution of the United States* at 343 (1910). Each House was given constitutional authority to determine the "Rules of its Proceedings," Art. I, § 5, cl. 2, and could have easily continued to operate under accepted procedure. Yet, the Framers of the Constitution found it necessary to provide the revenue raising restriction.

The Origination Clause was hotly debated during the Constitutional Convention and appeared to be a concession by the smaller states to the larger states in exchange for an equal vote in the Senate and certain powers in the Senate, e.g., the power of advice and consent on treaties and appointments. 2 M. Farrand, *Records of the Federal Convention of 1787* (1949) [hereinafter 2 Farrand], at 230-234 (Madison), 262-263 (Madison), 297 (Madison), 509 (Madison), 514 (Madison), 638 (Mason).

Such debate and concession reflects the significance of the Origination Clause as a matter of accountability and balance of power between the two houses. As Madison recognized:

> The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They in a word hold the purse; that powerful instrument by which we behold, in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58 at 394 (J. Madison) (J. Cooke ed. 1961).[12]

Petitioner argues the Clause does not provide direct protection to individual citizens and its significance has diminished with the change to a popularly elected Senate. [Pet. Br. 13]. This argument ignores the purpose of the Clause. The Origination Clause insures that the representatives most directly responsive to the people take the responsibility of taking money from the people through

[12] Petitioner inappropriately focuses on the balance of power issue and attempts to diminish the significance of the Origination Clause in equalizing the match between the House and Senate. [Pet. Br. 13-14, note 12]. This focus ignores the significance of the more immediate popular control that can be exercised over representatives elected every two, rather than six, years.

taxation.[13] Members of the House of Representatives are elected every two years and as a result are more immediately and directly accountable for their actions. The people can express displeasure by effecting a change in the House of Representatives every two years. The Senate is far more insulated in that only one-third of its membership can be changed every two years.[14] The House has recognized the value of the Origination Clause even after popular elections of Senators were allowed:

> It gives us a position of more importance and greater responsibility than any other department of it, and calls for the most scrupulous care on our part that we shall not be faithless to our exalted trust. Nor has our responsibility been diminished in relation to that of the Senate by the fact that in late years, under a change in the Constitution, the Senators are elected by the people as well as the House. That was only a change in the mode of their election; not a change in the powers of the Senate, nor a change in the constituency whom it represents.

[13] See excellent and thorough discussions of the history of the Origination Clause and its significance in the Constitutional Convention in J.L. Hoffer, *The Origination Clause and Tax Legislation*, B.U.J. Tax Law 1 (1984); Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 Nw. U.L. Rev. 419, 423-31 (1983); Medina, *supra* note 6, at 170-72.

[14] James Madison recognized the significance of placing the origination power in the more immediate representatives of the people:

> [B]ecause they were chosen by the People, and supposed to be best acquainted with their interests, and ability. In order to make them more particularly acquainted with these objects, the democratic branch of the Legislature consisted of a greater number, and were chosen for a shorter period, so that they might revert more frequently to the mass of the People.

3 M. Farrand, *Records of the Federal Convention of 1787*, App. A, CCXLII at 356 (James Madison in the House of Representatives).

See 66 Cong. Rec. 2948 (comments of Rep. Tucker).

4. There is no need for unquestioning adherence to a political decision already made, nor is there a potential for embarrassment from "multifarious pronouncements" by various departments. *Baker* v. *Carr*, 369 U.S. at 217. These two factors typically arise in circumstances where the Court is called upon to act in matters of foreign affairs, see, e.g., *Goldwater* v. *Carter*, 444 U.S. 996 (1979) (four-member plurality concluding that termination of a mutual defense treaty with the Republic of China presents a nonjusticiable political question), or where the issues involve the relationship between the states and the federal constitution, e.g., *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849) (Guaranty Clause presents nonjusticiable political question); *Coleman* v. *Miller*, 307 U.S. 433, 450 (1939) (determination of whether constitutional amendment lost vitality prior to the required state ratifications is a nonjusticiable political question). Even when foreign relations are involved, this Court has found its obligation to interpret the law paramount to the political overtones or position of the Congress and the Executive. *See Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. at 230 (determining challenge to the Secretary of Commerce's decision not to certify Japan for harvesting whales in excess of International Whaling Commission quotas not nonjusticiable political question).

There is no more danger of "multifarious pronouncements" here than in any instance where a court reviews a law passed by the Congress. The whole concept of judicial review involves another view of legislation beyond an advisory opinion. It is the constitutional obligation of the Judiciary to interpret the laws and decide whether they comply with the Constitution. No unusual political embarrassment can result from a judicial striking of a

statute enacted in violation of the Origination Clause; the alternative is to deny judicial review of a congressional violation of the Constitution.

II. SECTION 3013 VIOLATES THE ORIGINATION CLAUSE.

A. The Special Assessment Provision Is A "Bill[] For Raising Revenue" Within The Meaning Of The Origination Clause.

Revenue bills within the meaning of the Origination Clause are "those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *United States* v. *Norton*, 91 U.S. 566, 569 (1875); *Twin City Nat'l Bank* v. *Nebecker*, 167 U.S. 196, 203 (1897); *see also* Story, *Commentaries on the Constitution* 2 § 877 (1833), found in 2 P. Kurland & R. Lerner, *The Founders' Constitution* 387 (1987). A revenue bill is one "made for the direct and avowed purpose of creating revenue or public funds for the service of the government." *Id.* The test is whether the measure raises revenue for the sake of raising revenue for governmental use, or whether it raises revenues in the course of providing a service or achieving a regulatory end:

> No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the Constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of the estates to the United States, given a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring revenue into the Treasury.

Story, § 877. Revenue bills have been interpreted to include those that relate to revenue matters, not just those that increase revenue. *Armstrong* v. *United States*

("Bills for raising Revenue" does not refer only to laws increasing taxes but to all laws relating to taxes, including those that decrease taxes); *Wardell* v. *United States* (same); *Heitman* v. *United States* (same).

The distinction between revenue measures and others must be made with respect to the Framers' intent to keep revenue accountability in the House of Representatives. If the primary purpose of a measure is to raise revenue for governmental expenditures, it should not be exempt from the status of a revenue raising bill because it has another incidental or subsidiary effect or purpose. Nor should a measure be removed from the scope of the Origination Clause because it has a special or identified purpose to be funded by a tax on a certain class of people.

1. The primary purpose of the special assessment provision is to raise revenue for the general obligations of government. Congress provided for the assessments to be deposited into the Victims Assistance Fund. Victims of Crime Act of 1984, Pub. L. No. 98-473, § 1402(b), 98 Stat. 2171, 42 U.S.C. § 10601(b)(2). Other monies contributed to the Crime Victims Fund are (1) fines collected from persons convicted of offenses (with certain exceptions); (2) proceeds of forfeited appearance bonds, bail bonds and collateral collected under 18 U.S.C. § 3146 (penalties for failure to appear); and (3) any money ordered to be paid under 18 U.S.C. § 3671(c)(2)[15] (order of special forfeiture of collateral profits of crime). Pub. L. No. 98-473, § 1402(b), 98 Stat. 2170, 42 U.S.C. § 10601(b).

Congress also mandated that amounts in excess of a certain level "shall be deposited in the General Fund of the

[15] This section was renumbered as 18 U.S.C. § 3681(c)(2) by Pub. L. No. 99-646, Nov. 10, 1986, 100 Stat. 3600.

Treasury and shall not be a part of the Fund." Pub. L. No. 98-473, § 1402(c)(1), 98 Stat. 2171, 42 U.S.C. § 10601(c).[16] Initially no deposits were to be made into the fund after September 30, 1988. *Id.*[17] In addition, it was required that any sums awarded as part of a grant for victims assistance that remained unspent at the end of a fiscal year in which the grant was made, be expended in accordance with the grant during the next succeeding fiscal year.[18] Thereafter, the remaining unobligated sums "shall be returned to the General Fund of the Treasury." Pub. L. No. 98-473, § 1402(e), 98 Stat. 2171, 42 U.S.C. § 10601(e).

Nothing on the face of section 3013 reveals its underlying purpose. As recognized by the Court of Appeals, section 3013 does not limit or even describe the use of the collected funds [Pet. App. 8a]. The legislative history of the provision is direct:

> The purpose of imposing nominal assessment fees is to to generate needed income to offset the cost of the

[16] The "cap" was initially $100,000,000. It was raised in 1986 to $110,000,000. See Children's Justice Assistance Act of 1986, Pub. L. No. 99-401, § 102(b)(1), 100 Stat. 904. In 1988 this cap was raised to $125,000,000 through Fiscal Year 1991 and $150,000,000 through Fiscal Year 1994. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7121(a), 102 Stat. 4419. The 1988 amendments also provided for the use of sums in excess of the prior cap of $110,000,000. Pub. L. No. 100-690, § 7121(b), 102 Stat. 4419. Petitioner notes that the cap was exceeded in Fiscal Year 1989 by $8 to $9 million [Pet. Br. note 21]. The 1988 amendments allocated the first $2.2 million excess to carry out the functions of the Judicial Branch under 18 U.S.C. § 3611 (payment of a fine) and § 3612 (collection of an unpaid fine).

[17] A November 18, 1988 amendment extended the time for deposits to September 30, 1994. Pub. L. 100-690, § 7121(a), 102 Stat. 4420.

[18] Grants made during Fiscal Year 1985 were available for two succeeding fiscal years. *See* 42 U.S.C. § 10601(e)(2).

> [Victims Assistance Fund] authorized under S. 2423. Although substantial amounts will not result, these additional amounts will be helpful in financing the program and *will constitute new income for the federal government.*

Sen. Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984) (emphasis added). This language demonstrates that the assessments were in part intended to contribute to a crime victims fund to be used to defray the costs of eligible victims assistance and compensation funds. Assistance to potentially large numbers of individuals who are victims of crime should be considered a general obligation and expenditure of government. The Government assumes the responsibility of prosecuting those accused of crime and, as is apparent from this legislation, the general responsibility to raise revenue for assisting victims of crime.

Congress also contemplated there would be general federal revenue.[19] In addition, the Crime Victims Fund has a limited life and there is a cap on the fund.[20] Any monies over the cap go into the General Treasury.

2. Even if the primary purpose of section 3013 is to help fund the Crime Victims Fund, and such Fund is not

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[19] The Court of Appeals noted the testimony of Assistant Attorney General Lois Herrington before the Senate Judiciary Committee:

> Well, when we first looked into this on the task force, we looked into the size of the source of the funding and whether it would be really worthwhile to go after this, how much it would cost us to get it. We figured out it would be approximately $2 million as a fund. There are also several other proposals within the Department of Justice looking into how to use it in the criminal justice area. Because of the increase in the fine collection in the last year, we did not use this as a source of funding. It is a very small amount in the total fine collection.

[Pet. App. 9a].

[20] *See supra* notes 16 and 17.

viewed as a general expenditure of government, section 3013 is still a revenue raising measure within the meaning of the Origination Clause. A bill designed for a special purpose (e.g., crime victim's assistance) is not excluded from the mandate of the Origination Clause under the "incidental revenue" or "other primary purpose" test unless it is designed to benefit those that are levied against. *See United States* v. *Norton; Twin City Nat'l Bank* v. *Nebecker; Millard* v. *Roberts*. The critical analysis is whether the special purpose is designed to benefit the class of individuals against whom the levy is made.

United States v. *Norton*, 91 U.S. 566 (1875), declared a bill that created a postal money order system was not a revenue raising measure within the meaning of the Origination Clause even though there were to be charges for money orders and revenue raised thereby. The Court found that nothing in the act warranted the belief that Congress had any other purpose than to "promote public convenience, and to ensure greater security in the transmission of money through the United States mails." *Id.* at 568. In fact, "a willingness [was] shown to sink money, if necessary, to accomplish [the stated purpose]." *Id.* The charges for money orders were to be incurred voluntarily in arms length exchanges and were not designed to make a profit for the government. *Id.* The critical distinction between the money order act and the special assessments provision is that those who paid the money received the benefit of using the money orders and the money order system.

Twin City Nat'l Bank v. *Nebecker*, 167 U.S. 196 (1897), upheld charges on notes in circulation of banking associations organized under the National Banking Act. The charges were imposed only on banking associations that voluntarily incorporated as national banks and circulated

notes and were apparently to pay "expenses necessarily incurred" in procuring the notes and other expenses in managing the system. *Id.* at 198-99. Again, the charges were paid by those receiving the benefit or use of the services provided by the Act. The only associations affected were those that voluntarily incorporated as national banks and circulated the notes.

Millard v. *Roberts*, 202 U.S. 429 (1906), upheld three statutes which provided for payments to certain railroads for the purpose of eliminating grade crossings and for a union railway station in the District of Columbia. The statutes provided for the payment of a sum of money to the railroad companies to be raised by tax on property in the District of Columbia. These charges were also to be matched to the costs and benefits conferred on the District of Columbia. "Whatever taxes [were] imposed [were] but a means to the purposes provided by the act." *Id.* at 437. Again, there was an element of contract between the District of Columbia and the railroad company. The railroad surrendered certain property rights and agreed to construct a station and the government agreed to pay a certain sum. "It [was] a simple case of bargain and sale, like any other purchase." *Id.* at 437.

A clear distinction exists between the special assessments provision and the "pay as you go" provisions upheld in *Norton*, *Nebecker* and *Roberts*. The primary purposes of the measures upheld in those three cases were to benefit those persons against whom the levy was made. By contrast, the revenue raised by the special assessments provision is not used to defray costs of a service or program that "benefits" those who pay the charge. It would be a different situation if the primary purpose of the assessments were to defray the costs of incarceration of

convicted defendants.[21] In such a situation, the class of persons against whom the levy is made directly "benefits" from the purpose of the legislation.

Failure to consider the relationship between the purpose of the measure and the class of individuals levied against would allow the Senate to avoid the restrictions of the Origination Clause by proposing various pieces of special purpose legislation to be funded by any unrelated but identified class of people. The Senate could then originate a series of special purpose bills and select classes of individuals to pay for the special purposes which would have the overall effect of controlling the purse strings of the government. This procedure would directly avoid the accountability concerns of the Origination Clause, contrary to the intent of the Framers and the language of the Constitution.

3. Contrary to Petitioner's suggestion, section 3013 is not a penalty provision. [Pet. Br. 21]. A "penalty" is an exaction imposed by statute as punishment for an unlawful act. A "tax" is an enforced contribution to provide for the support of government. *United States* v. *La Franca*, 282 U.S. 568 (1931).

Although an assessment is a direct consequence of a criminal conviction, it is not a penalty for the conviction. The fact that section 3013 exacts money only from convicted persons does not mean that its purpose is punitive. Congress may define the class of objects to be taxed. *Head Money Cases*, 112 U.S. 580, 594-95 (1884); *United States*

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[21] *See, e.g.*, Guideline § 5E1.2(i) ("subject to the [ability of the defendant to pay], the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered"), United States Sentencing Guidelines at 5.20 (Nov. 1, 1989).

v. *Ptasynski*, 462 U.S. 74, 82 (1983). The mere fact that a pecuniary detriment is inflicted in consequence of a crime does not mean that it is a penalty. *Murphy* v. *United States*, 272 U.S. 630, 632 (1926). As a result, the class of individuals levied against is not determinative.

Section 3013 is not located in the sentencing provisions of Title 18 nor is it listed as a sentencing option. Since its passage, the statute itself has been placed in Chapter 201 of Title 18 of the United States Code entitled "General Provisions." Offenses against the United States are punishable by (1) probation, (2) a fine, (3) imprisonment, (4) forfeiture, (5) a notice to victims, or (6) an order of restitution. See 18 U.S.C. § 3551.[22] Probation may be for up to five years for a felony and a misdemeanor and up to one year for an infraction. 18 U.S.C. § 3561 (post-November 1, 1987). Imprisonment may be up to the statutory maximums provided in each criminal statute. Many offenses now carry statutory minimums, e.g., 18 U.S.C. §§ 922(g), 924(e) (armed career criminal punishable by fifteen years to life, no probation or parole); 21 U.S.C. § 841(b)(1)(A) (possession with intent to distribute large amounts of various controlled substances punishable by ten years to life, no probation, or parole). Fines for individuals may be up to the greatest of that reflected in the statute of conviction or $250,000 for a felony or misdemeanor resulting in death, $100,000 for a Class A misdemeanor, $5,000 for a Class B or C misdemeanor, and $5,000 for an infraction. See 18 U.S.C. § 3571.[23]

[22] 18 U.S.C. § 3551 took effect November 1, 1987 along with the provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, § 212 (a)(2), 98 Stat. 1988. Before that time, a defendant could receive a fine, imprisonment or probation or a combination as provided in Title 18 of the United States Code. Restitution could be ordered as a condition of probation or under the Victim Witness Protection Act of 1982. Pub. L. No. 97-291, § 5(a), 96 Stat. 1253.

Penalties in criminal cases traditionally have a relationship to the severity of the offense, the harm inflicted and the criminal history of the offender. Other than the basic gradations for felonies or misdemeanors and individuals or organizations, the special assessment does not vary depending on the severity of the offense or background of the offender. A defendant convicted of murder receives the same assessment as the defendant convicted of cashing a stolen social security check.

The mandatory assessment of $25 or $50[24] can hardly be considered a penalty where the stature is not within the sentencing provisions, the assessment is not a sentencing option and the amount is minuscule when compared to the potential penalties that can be imposed.[25] *Cf. United States* v. *Constantine*, 296 U.S. 223, 227 (1935) (the amount of the tax is significant of penal and prohibitory intent rather than the gathering of revenue; where the additional sum to be collected is "grossly disproportionate" to the amount of the normal tax, the con-

[23] Fines between January 1, 1985 and November 1987 were governed by 18 U.S.C. § 3623, Pub. L. No. 98-596, 98 Stat. 3137.

[24] In November 1988, the amounts were changed to range between $5 to $25 for misdemeanor level offenses (individual defendants), $25 to $125 for misdemeanor offenses by organizational defendants, $50 for a felony offense (individual defendants) and $200 for a felony offense by an organizational defendant. Pub. L. No. 100-690, § 7085, 102 Stat. 4408.

[25] The statute of limitations for collection of special assessments is now five years compared to twenty years for criminal fines. *See supra* note 1.

clusion must be that the purpose is to impose a penalty as a deterrent and a punishment for unlawful conduct).

Finally, while various references in the legislative history are to "penalty" assessments, it is the purpose of the "detriment" that controls, not the label. *United States* v. *La Franca*, 282 U.S. at 572; *United States* v. *Constantine*, 296 U.S. at 294. Petitioner's reliance on the label is also contradicted by the fact the statute as enacted refers to *special* not *penalty* assessments.

B. Section 3013 Originated In The Senate.

The special assessment provision at issue in this case was enacted into law on October 12, 1984 as part of the Comprehensive Crime Control Act of 1984. The Comprehensive Crime Control Act was one of several unrelated titles of H.R.J. Res. 648, enacted at Pub. L. No. 98-473. Petitioner agrees that the special assessment provision enacted into law on October 12, 1984 was not contained in H.R.J. Res. 648 at the time it passed the House and was sent to the Senate. [Pet. Br. 24]. Petitioner also agrees that it was the Senate that added section 1405 (enacted as 18 U.S.C. § 3013) to H.R.J. Res. 648. [Pet. Br. 24]. The dispute is over what the term "originate" means.

Petitioner is correct that on September 25, 1984, the House passed H.R.J. Res. 648, its version of the Continuing Appropriations Resolution for Fiscal Year 1985 [Pet. Br. 24]; 130 Cong. Rec. 26,837-26,838. As noted, at the time H.R.J. Res. 648 was passed by the House, it did not include a special assessment provision. The amendment adding the special assessment provision was made by the Senate on October 4, 1984 as section 1405 of H.R.J. Res. 648. 130 Cong. Rec. S13,520-S13,544. On October 10, 1984, the House adopted a version of H.R.J. Res. 648

including the Senate amendments and the Senate then passed it on October 11, 1984. The final version of H.R.J. Res. 648 became law on October 12, 1984 as Pub. L. No. 98-473.

Petitioner focuses on the passage of H.R. 5690, a bill that was passed by the House on October 2, 1984, which contained the precise special assessment language ultimately added by the Senate to H.R.J. Res. 648. However, H.R. 5690 never became law.

The most practical, logical and reasonable test for determining where a bill *originated* is to look to which body placed it into the legislation that was ultimately enacted.[26] Unless the Court follows this bright line test for determining the *origination* of a bill, there could be endless confusion over who thought of an idea first and

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[26] Although the "enrolled bill doctrine," *see, e.g., Field* v. *Clark*, 143 U.S. 649 (1892), was not raised by Petitioner, it is worthy of mention that such a test would not be appropriate in determining violations of the Origination Clause. Under the enrolled bill doctrine, a validly passed revenue raising bill could be struck as a violation of the Origination Clause if it carried a Senate bill label on its face. For example, the House could amend a Senate bill by adding a revenue measure. If the enrolled bill doctrine controlled, the face of the bill carrying the Senate bill label would result in striking an otherwise proper revenue raising provision. The doctrine should not be applied where the issue concerns a constitutional question, particularly when the constitutional question concerns where the bill originated. *See, e.g., Opinion of the Justices*, 223 A.2d 59, 61 (Del. 1967) (declining to apply enrolled bill doctrine because origination issues concerned a constitutional question); Medina, *supra* note 6, at n.187; Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary, supra* note 13, at 454-59; *see also Christoffel* v. *United States*, 338 U.S. 84 (1949).

who drafted the language.[27] Contrary to Petitioner's argument, this bright line test would not preclude the House from adopting a given revenue measure if the Senate passed the bill first. [See Pet. Br. 25 at note 24]. The House would simply exercise its prerogative to return the measure to the Senate and insert its own language. *See, e.g.*, 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives*, §§ 13-18, at 292-314 (1974); 2 Hinds, *supra* p. 8, §§ 1484, 1485, 1495, at 943-45, 967-69. However, under Petitioner's "who passed the language first" rule, the House could be forever precluded from originating a bill the Senate wrote and passed first. For example, the Senate could pass a bill the House had under consideration and thereby preclude the House from *originating* that bill.

Predecessor legislation should not be relevant to an inquiry under the Origination Clause. Not only could such an inquiry block the House from originating revenue bills, it could also result in long and confusing debates over whether representatives of the House or the Senate thought of an idea first or had even referred a certain idea to committee review first.[28]

C. The Senate's Addition Of Section 3013 To H.R.J. Res. 648 Was Not A Permissible Amendment.

The Senate may amend a bill originating in the House as long as the amendment remains germane to the subject

[27] Petitioner suggests that Congressman Rodino thought of the idea first. [Pet. Br. 25 at note 25]. In fact, Senator Heinz introduced the original special assessment provision on March 8, 1983. *See* S. 704, 129 Cong. Rec. 4283-4286. This "bill chasing" illustrates that it would be wholly inappropriate to consider "origination" in other than a bright line fashion.

[28] Even under the predecessor legislation test, the special assessments provision originated in the Senate as Senator Heinz was the first to introduce such legislation. *See supra* note 27.

matter of the House bill. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 143 (1911). If the House originated bill is a "revenue raising bill," the Senate may make revenue raising amendments. *Id.*; *Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163, 168 (5th Cir. 1985) ("subject matter" appears to require that both the amendment and the amended portion address revenue collection); *Armstrong* v. *United States*, 759 F.2d at 1381-82; *Wardell* v. *United States*, 757 F.2d at 205; *Heitman* v. *United States*, 753 F.2d at 35; *Liljenfeldt* v. *United States*, 588 F. Supp. 966 (E.D. Wis.), *aff'd*, 753 F.2d 1077 (7th Cir. 1984); *Rowe* v. *United States*, 583 F. Supp. 1516 (D. Del.), *aff'd*, 749 F.2d 27 (3d Cir. 1984); 2 Hinds, *supra* p. 8, § 1489 at 949-53.

The critical inquiry then is whether H.R.J. Res. 648 was a "revenue raising bill" within the meaning of the Origination Clause. Petitioner incorrectly argues the Court of Appeals misread H.R.J. Res. 648 and "ignored the fact that it was also a continuing appropriations resolution." [Pet. Br. 27]. The Court of Appeals recognized that H.R.J. Res. 648 was a continuing appropriations resolution and correctly concluded that "House joint resolution 648 did not deal with the raising of revenue." [Pet. App. 13a, 14a].[29] Regardless of whether the court consid-

[29] Petitioner did not make any argument to the Court of Appeals regarding the effect of the status of H.R.J. Res. 648 as a continuing appropriations bill. Petitioner also did not argue in the Court of Appeals that section 3013 was a permissible amendment to H.R.J. Res 648. Likewise, Petitioner did not challenge the ruling of the Court of Appeals on this issue in its petition for rehearing and suggestion for rehearing *en banc* and did not suggest in its petition for writ of certiorari that the Court of Appeals had misread the status of H.R.J. Res. 648. The petition for writ of certiorari also did not challenge the ruling of the Court of Appeals that section 3013 was not a permissible amendment to H.R.J. Res. 648. Prudential considerations may warrant a refusal to consider the argument now. *Cf. Steagald* v. *United States*, 451 U.S. 204, 209 (1981); *Illinois* v. *Gates*, 462 U.S. 213, 217 (1983).

ered the amended portion of the bill to be for crime control, its decision was correct in that none of the provisions of H.R.J. Res. 648 were "revenue raising." As discussed *supra*, II.A., revenue bills within the meaning of the Origination Clause are "those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." See *Norton, Nebecker, supra*.

Petitioner attempts to cloud the issue by focusing on the debate between the House and Senate over which body may originate appropriations bills. [Pet. Br. 28]. Under the guise of suggesting that this Court should not "endorse either view," Petitioner implicitly equates appropriations bills with revenue raising bills by exempting them from Origination Clause scrutiny.[30] To allow the Senate unrestrained authority to amend an appropriations bill is tantamount to allowing the Senate to originate a revenue bill by simply making it an amendment to an appropriations bill. This authority would either eliminate the constitutional requirement that revenue bills originate in the House of Representatives or it would mean

[30] This implicit holding would be contrary to the intent of the Framers. Part of the "Great Compromise" during which the state's representation was resolved, produced a version of the Origination Clause that provide "all Bills for raising *or appropriating money* . . . . shall originate in the first branch of the Legislature." 1 M. Farrand, *Records of the Federal Convention of 1787* at 524, 543-47 (1937) (emphasis added). This clause was stricken from the draft. 2 Farrand, *supra* p. 15, at 223-23. Similar language, "all bills for raising money for the purposes of revenue, *or for appropriating the same* shall originate in the House of Representatives" (emphasis added), was proposed later, 2 Farrand, *supra* p. 15, at 266, but again defeated. 2 Farrand, *supra* p. 15, at 280. The clause without limiting appropriations to House origination ultimately passed. 2 Farrand, *supra* p. 15, at 552.

that appropriations bills are revenue bills. Thus, the holding Petitioner seeks would in fact resolve the debate over whether appropriations bills are revenue bills, the resolution of which is not required by this case.

The issue before this Court is not whether the Senate may properly amend or even originate an appropriations bill. The issue is whether section 3013 was a permissible amendment to a House originated "revenue raising" bill. Nothing in H.R.J. Res. 648 as it originated in the House of Representatives was *revenue raising* within the meaning of Art. I, § 7, cl. 1.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether enforcement of the Origination Clause of the Constitution, Art. I, § 7, cl. 1 presents a nonjusticiable political question?

2. Whether 18 U.S.C. § 3013, which directs the federal courts to impose special assessments on defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, cl. 1?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 7, cl. 1 of the United States Constitution requires:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Title 18, United States Code, § 3013, as enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, ch. XIV, § 1405, 98 Stat. 2174-2175, provided:

> § 3013. Special assessment on convicted persons
>
> (a) The court shall assess on any person convicted of an offense against the United States—
>
> (1) in the case of a misdemeanor—
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony—
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.[1]

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[1] 18 U.S.C. § 3013 was amended by Pub. L. No. 100-185, § 3, Dec. 11, 1987, 101 Stat. 1279, and by Pub. L. No. 100-690, Title VII, §§ 7082(b), 7085, Nov. 18, 1988, 102 Stat. 4407, 4408.

The December 1987 amendments added subsections (c) and (d) providing that the obligation to pay an assessment ceases five years after the date of the judgment and that an offense under section 13 of

SUMMARY OF ARGUMENT

1. The Court of Appeals correctly decided that the Origination Clause is subject to judicial review and does not present a nonjusticiable "political question." An analysis of the factors set forth in *Baker* v. *Carr*, 369 U.S. 186 (1962), compels the conclusion that judicial interpretation of the Origination Clause is not precluded by the political question doctrine. Nothing in the text of the Constitution commits to Congress the sole authority to decide whether an act violates the Origination Clause. Congress has relied on judicial interpretations in deciding whether a bill violates the Origination Clause. Interpreting the Origination Clause does not require the Court to make policy determinations. The ability of the House to protect and assert its prerogative under the Origination Clause cannot preclude the Court from performing its historical function of interpreting the Constitution. The Origination Clause is not simply a rule of parliamentary procedure or

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Title 18, United States Code (the Assimilative Crimes Act) is an offense against the United States. The five year limitation provided in subsection (c) is shorter than the twenty year statute of limitations applicable to fines. See 18 U.S.C. § 3565(h) (1985), repealed and replaced by 18 U.S.C. § 3613(b) (1987). The provision regarding applicability to Assimilative Crimes under 18 U.S.C. § 13 was added in order to overturn court decisions that had held the assessment not applicable to such convictions. H.R. Rep. No. 100-390, at 4.

The November 1988 amendments changed the amounts of the assessments applicable to various levels of cases and specified that the five year statute of limitations applies to all assessments regardless of the date of imposition. Pub. L. No. 100-690, § 7085, 102 Stat. 4408.

Neither the December 1987 nor November 1988 amendments altered the directive in section 3013(a) that the court *shall* assess the applicable amount on any person convicted of an offense against the United States.

only a "matter of sequence"; it is a constitutional rule of accountability for revenue legislation as well as a balance of the power between the House and Senate. The Clause provides direct protection to individual citizens by insuring that the representatives most directly responsive to the people take the responsibility of taking money from the people through taxation. Judicial interpretation of the Origination Clause presents no more danger of "multifarious pronouncements" than in any instance where a court reviews a law.

2. Section 3013 violates the Origination Clause.

a. The purpose of section 3013 is to raise revenue for the general obligations of government. Even if the purpose of section 3013 is a more limited or "special" purpose, it is not exempt from the Origination Clause. The funds are not designed to benefit the class of individuals levied against and are not used to offset costs of a service that benefits those individuals who pay the charge. *See Millard* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Nat'l Bank* v. *Nebecker*, 167 U.S. 196 (1897); *United States* v. *Norton*, 91 U.S. 566 (1875). Finally, section 3013 is not a penalty provision. It is not located in any sentencing provision of Title 18, nor is it a viable sentencing option for federal judges. The statute does not refer to penalty assessments, but rather, to *special* assessments.

b. Section 3013 originated in the Senate. The Senate was the first body to place the special assessment provision into the legislation that was ultimately enacted. On September 25, 1984, the House passed H.R.J. Res. 648, without a special assessment provision. On October 4, 1984, the Senate amended H.R.J. Res. 648, adding the special assessment provision. The fact that the provision the Senate inserted into H.R.J. Res. 648 was identical to

Respondent recognizes, as he must, that the special assessments are to be deposited in the Crime Victims Fund, but he maintains that the special assessment provision is a "Bill[] for raising Revenue" because (1) the Fund should be considered a general expenditure of government; (2) the special assessment provision itself does not express a purpose; and (3) even if providing money for the Victims Fund is the primary purpose and the Fund is not a general expenditure of government, there is not a sufficient relationship between the people on whom the fee is imposed (persons convicted of federal offenses) and the people who benefit from the fund (victims of crime). Resp. Br. 18-23. None of these arguments is well founded.

Respondent's first argument—that the Fund should be considered a general expenditure of government—rests principally on the view that "[a]ssistance to potentially large numbers of individuals who are victims of crime should be considered a general obligation and expenditure of government." Resp. Br. 20. That view is mistaken. The size of the beneficiary class has never been the touchstone for this Court's analysis of whether legislation is a "Bill[] for raising Revenue." In *Nebeker*, for instance, this Court noted that the purpose of the legislation at issue was to benefit "the people" throughout the nation.[5] The

King, No. 89-3037 (Dec. 12, 1989); see also *United States* v. *Newman*, 889 F.2d 88 (6th Cir. 1989) (victims assistance purpose).

[5] See *Nebeker*, 167 U.S. at 203 ("The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country.").

fact that the statute in question would benefit "potentially large numbers of individuals" did not prevent the Court from finding that it was not a "Bill[] for raising Revenue." Moreover, as a matter of logic, there is no reason why the size of the beneficiary class should be related to the purpose-of-legislation test suggested both by the words of the Clause ("Bills *for* raising Revenue") and by this Court's decisions in *Millard*, *Nebeker*, and *Norton*.

Respondent's suggestion that "[n]othing on the face of section 3013 reveals its underlying purpose" (Br. 19) ignores the fact that several provisions of the Victims of Crime Act of 1984 (of which the special assessment provision was one section) reveal with unmistakable clarity that assisting victims was the principal purpose of the Act. See, *e.g.*, Pub. L. No. 98-473, § 1402, 98 Stat. 2170 (establishing the "Crime Victims Fund"); § 1403, 98 Stat. 2171 (criteria for "crime victim compensation"); § 1404, 98 Stat. 2172 (criteria for "crime victim assistance"). To the extent that respondent suggests that the special assessment provision, which was part of the Victims of Crime Act (§ 1405, 98 Stat. 2174) and integrally related to the other provisions, should be viewed in isolation from the other provisions of the Act, his argument is contrary to the "fundamental" axiom that a "section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369 U.S. 1, 11 (1962).

Respondent also suggests that the special assessment provision is a "Bill[] for raising Revenue" because it does not directly benefit those who pay the assessment. Resp. Br. 20-23. Here, too, respondent's theory is unsupported by this Court's precedents. Contrary to respondent's contention, *Nebeker* does

not support his proposed "relationship" test. In *Nebeker*, this Court emphasized that the nation as a whole benefited from the legislation at issue, and the fee was imposed only on banks. The language of the Origination Clause contains no suggestion that the relationship between the beneficiaries of legislation and the persons who pay a fee incident to that legislation bears on the question whether a particular bill is one "for raising Revenue."

Finally, respondent maintains that the special assessment cannot be viewed as penal in nature. Resp. Br. 23-26. Respondent contends that the purpose of the special assessment provision is simply to impose a tax on convicted persons. The assessment, however, is imposed for commission of a crime; it varies according to whether the crime is a felony or a misdemeanor; it is imposed in the same manner as a sentence; a separate assessment is imposed for each count of conviction; and the assessment is referred to in the statute as a "penalty assessment."[6] Under these circumstances, it is clear that Congress intended the special assessment to be exacted roughly according to the seriousness of the defendant's misconduct and to serve, at least in part, a penal purpose.

b. In our opening brief, we explained that the special assessment provision should be regarded as having "originated" in the House of Representatives, be-

[6] Although respondent maintains that "[t]he statute does not refer to penalty assessments" (Br. 3, 26), the Victims of Crime Act of 1984 uses precisely that language at two points. See Pub. L. No. 98-473, § 1402(b)(2), 98 Stat. 2171 (referring to the "penalty assessments collected under section 3013 of title 18 of the United States Code"); § 1405, 98 Stat. 2174 (title of special assessment section is "PENALTY ASSESSMENT").

cause the House was the first chamber to pass the measure ultimately enacted into law. The House passed the special assessment provision on October 2, 1984, seven days after it passed H.R.J. Res. 648, 98th Cong., 2d Sess., the continuing appropriations resolution; then, on October 4, 1984, the Senate combined the House-passed special assessment provision with the House-passed H.R.J. Res. 648. After H.R.J. Res. 648 emerged from conference containing the special assessment provision, the House passed that conference version on October 10, the Senate passed it on October 11, and the President signed it on October 12. Gov't Br. 23-24; Pet. 9, 17-18.

Respondent does not dispute this chronology. Resp. Br. 26-27. Instead, he argues for a rigid rule that the House of Representatives may be found to "originate" legislation for the purposes of the Origination Clause only if the House is the first chamber to place the provision in question in the particular bill that is ultimately enacted. By virtue of the chronology previously set forth (*i.e.*, because the Senate took the language of the special assessment provision from an earlier House bill and inserted it into H.R.J. Res. 648, which was thereafter enacted into law), respondent contends that the special assessment statute must be regarded as having originated in the Senate, even though the bill from which the language was taken and the bill into which it was inserted both originated in the House. Resp. Br. 27-28.[7] Respond-

[7] Respondent has abandoned the analysis of the court of appeals, which suggested (Pet. App. 13a-14a) that the special assessment provision that was enacted into law originated in the Senate because it derived from a Senate bill, S. 2423, 98th Cong., 2d Sess., which passed the Senate in August 1984. Respondent nevertheless maintains that "Senator Heinz in-

ent argues that this rule is necessary for two reasons—ease of administration and preservation of existing House practices. Neither reason withstands scrutiny.

This Court has never suggested that ease of judicial administration justifies a rigid approach to Origination Clause analysis. Recognizing the complexity and delicacy of judicial action in this field, the Court in *Nebeker* explicitly disavowed any attempt to formulate a definition of "Bills for raising Revenue" in order to simplify the process of judicial review. See *Nebeker*, 167 U.S. at 202 ("What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."). Similar caution should inform the judicial approach to the question of origination. Rather than adopting respondent's so-called "bright line test" (Resp. Br. 27), the Court should recognize that a variety of House actions may satisfy the constitutional requirement of "origination." Ease of administration is hardly an adequate justification for refusing to recognize House origination when the House is the first chamber to propose and pass a piece of legislation, the Senate combines that legislation with another House-originated measure, and the Senate and House then pass the consolidated bill. Surely

troduced the original special assessment provision on March 8, 1983" in S. 704, 98th Cong., 1st Sess. Resp. Br. 28 n.27. In fact, however, S. 704 was very different in content and structure from the provision ultimately enacted; H.R. 3498, 98th Cong., 1st Sess., in contrast, which was introduced by Congressman Rodino in 1983, is extremely close to the ultimately enacted version of the special assessment. See Gov't Br. 25 n.25.

no value or principle informing the Origination Clause justifies ignoring the fact that the House was the first chamber to pass the provision that became law. To override the House's judgment that no Origination Clause problem was presented in a particular situation should require more than the administrative convenience provided by a rule that restricts a court to looking to the first time the final statutory language was included in the particular numbered bill ultimately enacted by both Houses.

Respondent errs in asserting that our proposed test for determining origination would tie the House's hands. We do not suggest that "origination" may be found only in a sequence such as occurred in this case. Nor, contrary to respondent's contention (Br. 28), do we suggest that there is any Origination Clause flaw in the established practice by which the House refuses to consider revenue legislation initiated by the Senate but passes identical legislation and sends it to the Senate. Rather, we submit that House "origination" may be satisfied through a variety of methods, including that procedure and including a procedure such as the one in this case, where the House is the first body to pass a provision and the Senate incorporates the House proposal into a different, separately numbered bill. That approach to origination questions is consistent with the particular caution that must accompany judicial involvement in Origination Clause determinations, as well as the caution and restraint exercised by courts in considering challenges to the constitutionality of statutes.

There is an irony about respondent's "bright line" test and his argument about why that test is needed. In the first half of his brief, he argues that the Orig-

ination Clause does not pose a problem of judicially manageable standards, and that (in part by virtue of that reason) the Court should find Origination Clause challenges to be justiciable. In the second half of his brief, respondent proposes a "bright line" test that will make Origination Clause challenges more suitable for adjudication, even though it may not be responsive in many cases to the realities of the origination of legislative proposals. See Resp. Br. 27-28 ("Unless the Court follows this bright line test for determining the *origination* of a bill, there could be endless confusion over who thought of an idea first and who drafted the language."). The fact that respondent feels compelled to devise a new, mechanical test for origination that will exclude cases such as this one, in which the precise language ultimately enacted originated in the House, is strong support for the proposition that enforcing the Origination Clause is not a task for which courts are well suited.

c. In our opening brief, we explained that this Court should not find the Senate's amendment impermissible, even if it is determined that the special assessment provision was a "Bill[] for raising Revenue" and that it "originated" in the Senate, because such a conclusion would thrust this Court into the midst of the longstanding congressional dispute about whether appropriations bills are within the scope of the Origination Clause. Gov't Br. 26-29.[8] Although respondent contends that "the resolution" of this de-

[8] Respondent's suggestion (Resp. Br. 29 n.29) that the amendment issue has not been properly raised and preserved is incorrect. The issue was explicitly addressed both by the court of appeals (Pet. App. 14a) and the district court (Pet. App. 22a n.3), and it is encompassed in the question presented in our petition.

bate "is not required" here (Resp. Br. 31), his argument continues to rest on the proposition that "none of the provisions of H.R.J. Res. 648"—which of course included many appropriations provisions—"were 'revenue raising.' " Resp. Br. 30. See also *id.* at 31 ("Nothing in H.R.J. Res. 648 as it originated in the House of Representatives was *revenue raising* within the meaning of Art. I, § 7, cl. 1."). Thus, his protestations notwithstanding, respondent's challenge to the Senate's amendment requires a holding that H.R.J. Res. 648 was not a "Bill[] for raising Revenue," and thus that appropriations bills are not such bills.[9]

This Court should not endorse either position in the longstanding battle between the House and Senate over the status of appropriations bills; instead, the Court should hold that, in view of that venerable controversy, a Senate amendment to a House bill that contains appropriations provisions will not be invalidated as an impermissible exercise of the Senate's amendment power under the Origination Clause. Respondent suggests that this position is itself an endorsement of the House position that appropriations bills are "Bills for raising Revenue." Resp. Br. 30-31. There is a fundamental difference, however, between the reasons for refusing to invalidate legislation as unconstitutional, which may rest on a variety of prudential concerns, and the reasons compelling a

[9] To the extent respondent suggests that only a "portion" of the amended statute need be examined (Br. 29-30), the suggestion conflicts with this Court's analysis of the Senate's amendment powers. See *Rainey* v. *United States*, 232 U.S. 310, 317 (1914) (" 'It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient.' ").

finding of unconstitutionality. A refusal to intrude into this congressional debate would be consistent with principles of judicial deference and restraint.[10] A decision that the Senate amendment here was impermissible, in contrast, would inject this Court into an internal congressional battle, and would be inconsistent with those principles.

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1990

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[10] Cf. *Matthews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review * * * in the area of immigration and naturalization.") (footnote omitted).

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